SUPREME COURT OF THE UNITED STATES.

No. ~~222~~ 104.

GARDNER P. DRURY, APPELLANT,

vs.

THOMAS FOSTER AND HANNAH C. FOSTER, HIS WIFE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

GOVERNMENT PRINTING OFFICE.

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Citation.

1 UNITED STATES OF AMERICA, *ss:*

To Thomas Foster and Hannah C. Foster, his wife, greeting:

Whereas Gardner P. Drury has appealed to the Supreme Court of the United States from a final decree lately rendered in the district court of the United States for the district of Minnesota, in a cross suit therein pending, wherein he, the said Gardner P. Drury, was defendant, and you, the said Thomas Foster and Hannah C. Foster, were plaintiffs; and in the original suit therein pending he, the said Gardner P. Drury, being plaintiff, and you, the said Thomas Foster and Hannah C. Foster, and one William L. Banning, being defendants, and has given the security required by law:

You are therefore hereby cited and admonished to be and appear before the said Supreme Court, next to be holden at the city of Washington, in the District of Columbia, on the first Monday in December next, and then and there to answer to said appeal, and to stand and abide such order and decree in the premises as to said court shall seem meet.

Witness the honorable Rensselaer R. Nelson, judge of the said district court for the district of Minnesota, at the city of Saint
2 Paul, in the said district, this 25th day of April, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-sixth.

R. R. NELSON, *U. S. Judge.*

Service by copy admitted this 25th day of April, 1862.

C. D. GILFILLAN,
Appellees' and Def'ts' Solrs.

Filed April 25, 1862.

Pr. JAS. W. TAYLOR, *Clerk.*
J. N. CORDEZ, *Dep.*

3 UNITED STATES OF AMERICA,
District of Minnesota, ss:

GARDNER P. DRURY *vs.* THOMAS FOSTER and HANNAH C. FOSTER, his wife, } Original bill.

THOMAS FOSTER and HANNAH C. FOSTER, his wife, *vs.* GARDNER P. DRURY. } Cross-bill.

Pleas.

Before the honorable Rensselaer R. Nelson, judge of the district court of the United States for the district of Minnesota, of the

October term thereof, held at Saint Paul, in and for said district, in the year of our Lord one thousand eight hundred and sixty-one, and of the independence of the United States the eighty-sixth.

4 DISTRICT OF MINNESOTA, *ss:*

Be it remembered, that on the first day of April, in the year of our Lord one thousand eight hundred and sixty-one, came Thomas Foster and Hannah C. Foster, his wife, by C. D. Gilfillan, their solicitor, and filed in the clerk's office of said court at Saint Paul, in said district, their cross-bill of complaint in the following, to wit:

To the honorable the judge of the district court of the United States for the district of Minnesota, sitting in equity:

Thomas Foster and Hannah C. Foster, his wife, of Saint Paul, in the State of Minnesota, and citizens of the State of Minnesota, bring this, their cross-bill of complaint, against Gardner P. Drury, of Boston, in the State of Massachusetts, and a citizen of said
5 State. And thereupon your orators complain and say, that Gardner P. Drury, the defendant above named, on or about the 27th day of February, A. D. 1861, filed his bill of complaint in this honorable court against your orators and William L. Banning and Edward F. Parker, as defendants, which said bill of complaint charges, among other things, that your orators, on or about the 27th day of April, 1857, jointly executed, acknowledged, and delivered, to said Gardner P. Drury, the complainant therein, a mortgage deed, bearing date on said last-named day and year, whereby they (your orators) granted, bargained, sold, and conveyed unto said Gardner P. Drury, and to his heirs and assigns forever, all that tract or parcel of land, with the appurtenances, lying and being in the (then Territory) present State of Minnesota, described as follows, to wit:

Lots six (6) and seven (7) and the southwest quarter of the southeast quarter in section No. twenty-seven, (27,) in township No. one hundred and fifteen (115) north, of range No. seventeen (17) west, in the Redwing land office; that said mortgage was, on the 25th day of May, 1857, at ten o'clock in the forenoon, duly recorded as a mortgage in the office of the register of deeds in and for the said county of Dakota, in book "D" of mortgages, on pages
6 188, 189, & 190, and that said mortgage, grant, and conveyance, was upon this condition: That if these, your orators, their heirs, executors, administrators or assigns, should well and truly pay or cause to be paid to the said Gardner P. Drury, his heirs, executors, administrators, or assigns, the sum of twelve thousand seven hundred and eighty-five dollars and forty cents, according to the conditions of five promissory notes, bearing even date with said mortgage, made by your orator, Thomas, then said mortgage, grant, and conveyance should be null and void; otherwise to be and remain in full force and effect, and which bill of complaint is brought for the purpose of foreclosing said pretended mortgage, and prays, as against these your orators, that the defendants therein may, if they can, show why the complainant shall not

have the relief therein prayed, and may without oath, their answer under oath being thereby waived, and according to the best and utmost of their several and respective knowledge, rememberance, information, and belief, full, true, direct, and perfect answer make to all and singular the premises therein; and that the usual decree may be made for the sale of the said premises, and for the payment
7 of the amount due and to become due to the complainant therein, for the principal and interest aforesaid, and for certain moneys therein alleged to have been paid for taxes and costs and disbursements of suit; and that the defendants therein, and all persons claiming under them or either of them, subsequent to the commencement of said suit, and all persons who have any lien thereon by judgement, decree, or otherwise, subsequent to the commencement of said suit, may be forever barred and foreclosed of and from all right and equity of redemption, and of all lien and interest in and upon said premises, and every part and parcel thereof, and that said complainant therein may have such other or further relief, or both, in the premises as the nature of the case may require, and as may be agreeable to equity; and also prays for the writ of subpœna, commanding the defendants therein, at a certain day, and under a certain penalty, in said writ to be specified, personally to be and appear before your honor in this court, and then and there stand by and abide such order and decree therein as to your honor
8 shall seem meet.

And thereupon such writ of subpœna was duly issued, pursuant to said prayer of said bill of complaint, commanding the defendants therein personally to appear before your honor in this court, to answer to said bill of complaint, on the first Monday of April, then next ensuing, (being the first Monday of April, A. D. 1861;) and after the filing of such bill of complaint, your orators were duly served with said writ of subpœna, but they have not, nor has either of them, answered, pleaded, nor demurred to said bill of complaint, or any part thereof.

And the said cause is still pending and has not yet been heard, and the time for your orator to appear and answer unto said bill of complaint has not yet arrived.

All of which matters and things, reference being had to the said bill of complaint subpœna, and other proceedings in the cause now remaining filed, as of record in this honorable court will more fully appear.

And your orators, further complaining, say that Hannah C. Foster, one of your orators, never at any time, either jointly or alone,
9 executed, acknowledged, or delivered to said Gardner P. Drury the said pretended mortgage, or any mortgage upon the said described real estate, or any part thereof, or upon any other real estate.

But your orators aver the fact to be, that on the 27th day of April, 1857, and for a long time before and ever since your orators were and now are husband and wife, and on said day, and for a long time before and ever since the said Hannah C. was and now is the owner

in fee simple in her own right, as her separate estate and property, of the whole of the real estate mentioned and described in said bill of complaint, and hereinbefore mentioned and described. That on or about said day the said Thomas Foster proposed and intended to borrow, upon mortgage of said real estate, the sum of six or seven hundred dollars, and proposed to said Hannah C. that she should execute with him a mortgage upon said real estate for the purpose of securing such loan if made. That on said day a paper was prepared by said Thomas in the form of a blank mortgage deed
10 by your orators upon said real estate, but without the name of any mortgagee or grantee, or any consideration or sum of money, or time of payment, or any condition whatsoever being stated therein, which said paper, on said 27th day of April, 1857, at Hastings, in the county of Dakota and Territory of Minnesota, was brought to said Hannah C. by one A. M. Hayes, then a notary public in and for said Territory, who then and there presented the same to said Hannah C. and importuned and solicited her to sign her name, to seal and acknowledge the same. And thereupon she, supposing that the same was to be used only for the purpose of procuring a loan of six or seven hundred dollars as aforesaid, did sign her name to, seal, and acknowledge the same before said notary public. And said notary public and one other person did subscribe their names as attesting witnesses thereto, and said Thomas did then and there in like manner sign his name to, seal, and acknowledge the same; and thereupon said notary public, in due form of law, wrote and signed, as such
11 notary, upon said paper the usual certificate of acknowledgement, the said paper being then and there in blank as aforesaid, without the name of any mortgagee or grantee, or any consideration or sum of money or time of payment, or any conditions whatsoever being stated therein.

And afterwards, to wit, on the 21st day of May, 1857, at the city of Saint Paul, in the county of Ramsey, in said Territory, the said Thomas negotiated with the said Gardner P. Drury the loan mentioned in said bill of complaint, to wit, the loan of eight thousand five hundred dollars, for the term of two years from the 27th day of May, 1857, upon interest at the rate of twenty-five per cent. per annum, from and after the 21st day of May, 1857; and said sum, having been advanced and loaned by said Gardner P. Drury to said Thomas, said Thomas then and there executed to said Drury his five several promissory notes for the payment of said principal sum and said interest, according to the terms of said loan, the amount of said principal and interest for said two years, and the amount for which said notes were drawn, being the sum of twelve thousand seven
12 hundred and eighty-five dollars and forty cents; and on such negotiation, the said Thomas, having in his possession the said paper in blank as aforesaid, signed, sealed, and acknowledged as aforesaid, did, at St. Paul aforesaid, on said 21st day of May, 1857, deliver the same to said Gardner P. Drury, without the knowledge, privity, or consent of said Hannah C., and then and there, either immediately before or immediately after such delivery, but whether

immediately before or immediately after, said Thomas does not now recollect, and said Hannah C. does not know and never knew, some person other than either of your orators, but the name of which person the said Thomas does not now recollect, and said Hannah C. does not know and never knew, but without the knowledge, privity or consent of the said Hannah C., filled the said blanks in said paper by writing and inserting therein the name of said Gardner P. Drury, as grantee or mortgagee therein, and the sum of twelve thousand seven hundred and eighty-five dollars and forty cents as the
13 consideration thereof, and the condition that the same should be void, if your orators should well and truly pay or cause to be paid to the said Gardner P. Drury, his heirs, executors, administrators or assigns, the said sum of twelve thousand seven hundred and eighty-five dollars and forty cents, according to the condition of said promissory notes; otherwise to be and remain in full force and effect. That there were no subscribing witnesses to said delivery, nor to the filling up of said blanks as aforesaid, and the execution of such paper was never, after such delivery or the filling up of the said blanks as aforesaid, acknowledged by the said Hannah C. And said paper never was delivered to said Gardner P. Drury, or any other person, by the said Hannah C., nor by any person for her, or by her authorized to deliver the same as a deed or mortgage, and the said blanks in said paper were not filled up as aforesaid by her, nor by any other person for her, or with her authority, knowledge, privity, or consent, and she has never in any manner assented to, affirmed, or ratified such delivery or filling up of such blanks.
14 And at the time of the delivery of said paper and the filling up of the blanks therein, and at the time of the loaning by said Gardner P. Drury to said Thomas of the aforesaid sum of money, the said Drury well knew that said paper was signed, sealed, and acknowledged by said Hannah C. in blank, as aforesaid, and that the same was not delivered, nor said blanks filled up as aforesaid by her, nor by any other person by her authorized, or with her knowledge, privity, or consent. Nevertheless the said Gardner P. Drury did receive said paper, and afterwards, on the 25th day of May, 1857, caused the said paper, the blanks being filled up as aforesaid, to be recorded as a mortgage against both your orators in the office of the register of deeds of said county of Dakota, in book "D" of mortgages, on pages 188, 189 and 190, and the same remains a cloud and apparent incumbrance upon the title of said Hannah C. to said real estate. And the said paper, so signed, sealed, acknowledged, delivered and filled up as aforesaid, is the same pretended mortgage mentioned and described in said bill of complaint, and none other or
15 different.

That the money loaned by said Drew to said Thomas was not borrowed nor used for her benefit, nor with her privity or knowledge, and the said paper is now held and in possession of the said Gardner P. Drury, who claims that the same is a valid mortgage and lien as against the title of said Hannah C. on said real estate. That said real estate is of great value, and the acts and doings of the said Gard-

ner P. are contrary to equity and good conscience, and tend to the injury and oppression of the said Hannah C.

And your orators further say, that an answer to said bill of complaint has been prepared by them to be filed, wherein is alleged the foregoing facts; but your orators cannot fully answer to said bill, nor fully establish the defence of said Hannah C. thereto, without an opportunity to inspect the said paper now in possession of said Gardner P. Drury, or in the hands of his solicitors and under his control, because they do not know by whom the blanks in said paper were filled up as aforesaid, and it is essential and necessary for your ora-
16 tors to know by whom such blanks were filled up, in order to enable them to prove that such person was not authorized by said Hannah C. to fill up the same. And they verily believe, and therefore aver, that by an inspection of the handwriting in which said blanks in said paper were filled, they will be enabled to know by whom they were filled.

And your orators have, by their agents and attorneys, made application to the solicitors of said Gardner P. Drury, in whose hands said paper now is, the said Gardner P. Drury not being within the State of Minnesota, for leave to see and examine said paper, and such leave was refused, and your orators have been unable to see and examine the same.

In consideration whereof, and forasmuch as your orators cannot, upon said bill of complaint and answer in said suit, obtain for said Hannah C. the relief to which she is in equity and justice entitled, and forasmuch as your orators cannot well establish the defence of said Hannah C. to said bill of complaint, without the produc-
17 tion and inspection of said pretended mortgage deed mentioned and described in said bill of complaint:

And to the end, therefore, that the said Gardner P. Drury may, if he can, show why your orators should not have the relief prayed, and may without oath, his answer under oath being hereby waived, and according to the best and utmost of his knowledge, remembrance, and belief, full, true, direct, and perfect answers make to all and singular, the premises aforesaid. And that the said Gardner P. Drury may deposit with the clerk of this honorable court at his office the said pretended mortgage deed mentioned and described in said bill of complaint, to be examined and inspected by your orators and their solicitors, and for the usual purposes. And that the said pretended mortgage deed may, as against the said Hannah C., and as against her title to and interest in said real estate, be adjudged and decreed null and void; and may, as against said Hannah C., and her said title and interest, be set aside, cancelled, and discharged. And that
18 your orators may have for said Hannah C. such other or further relief, or both, in the premises as the nature of the case may require, and as may be agreeable to equity, with their costs and disbursements herein.

May it please your honor to grant unto your orators the writ of subpœna of the United States of America, issued out of, and under the seal of, this court, directed to the said Gardner P. Drury, commanding

him at a certain day, and under a certain penalty therein to be specified, personally to be and appear before your honor in this court, and then and there stand by and abide by such order and decree therein as to your honor shall seem meet.

And your orators shll ever pray, &c.

C. D. GILFILLAN,
Solicitor for Complainants.
JAMES GILFILLAN,
of Counsel.

ST. PAUL, *March 30th*, 1861.

STATE OF MINNESOTA,
County of Ramsey, ss:

19 On this 1st day of April, A. D. 1861, before me personally appeared the above-named Thomas Foster, and made oath that he has read the above bill and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on the complainants' information or belief, and as to those matters he believes it to be true.

THOMAS FOSTER.

Subscribed and sworn to before me this 1st day of April, A. D. 1861.

GEO. W. PRESCOTT, *Clerk.*

I certify that I have perused the within cross-bill, as well as the original bill filed in this cause, and I am of the opinion that the within bill is not intended for delay, and that a stay of proceedings in the original suit is necessary for the attainment of justice in this cause.

Dated St. Paul, April 1, A. D. 1861.

JAMES GILFILLAN, *Counsel.*

20 And thereupon, on application of said solicitor, a writ of subpœna was duly issued, in the words and figures following, to wit:

THE UNITED STATES OF AMERICA,
District of Minnesota:

[SEAL.] *The President of the United States to Gardner P. Drury, greeting:*

You are hereby commanded that you personally appear before the judge of the district court of the United States of America for the district of Minnesota, in our court of chancery in and for the district aforesaid, on the first Monday of May next ensuing, at the city of St. Paul, in said district, to answer to a cross-bill of complaint exhibited against you, in our said court, by Thomas Foster and Hannah C. Foster, and to do further and receive what our said court shall have considered in that behalf; and this you are not to omit, under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said
21 Gardner P. Drury, if to be found in his district, and due return thereof make.

Witness the Hon. Rensselaer R. Nelson, judge of the said district court of the United States, at the city of St. Paul, in the said district of Minnesota, this first day of April, in the year of our Lord one thousand eight hundred and sixty-one, and of the independence of the United States the eighty-fifth.

GEORGE W. PRESCOTT, *Clerk.*
C. D. GILFILLAN,
Plaintiffs' Solicitor.

Memorandum.

The defendant served in this action is hereby notified to enter his appearance in this suit in the clerk's office, at said St. Paul, on or before the day and time at which this subpœna is returnable, as aforesaid; otherwise the bill filed may be taken as confessed.

And which said process of subpœna was duly tested, signed,
22 and sealed with the seal of our said court, and which said process of subpœna was subsequently returned to the said clerk's office by the marshal of the district of Minnesota, endorsed as follows, to wit:

DISTRICT OF MINNESOTA, *ss:*

I hereby certify that I have made dilligent search and inquiry, and have not been able to find the within-named Gardner P. Drury in my district.

WM. B. GERE,
U. S. Marshal.

April 5th, 1861.
Fees, $1 00.

And afterwards, to wit, at rules held in the said clerk's office, on the sixth day of May, in the year of our Lord one thousand eight hundred and sixty-one, came the said defendant, Gardner P. Drury, by Hale and Bond, his solicitors, and on whose motion it is ordered that the appearance of said defendant, summoned to answer the cross-bill of said Foster and wife, be, and it is hereby, entered.

And afterwards, to wit, at rules held in the said clerk's
23 office, on the first day of June, in the year one thousand eight hundred and sixty-one, the following proceeding, among others, was had, to wit:

GARDNER P. DRURY
vs.
THOMAS FOSTER & wife *et al.* } Original bill.

THOMAS FOSTER & HANNAH C. FOSTER, his wife,
vs.
GARDNER P. DRURY. } Cross-bill.

It is hereby ordered that the defendant, Drury, in the action last above entitled, have till the first Monday in July next, to answer the

cross-bill of complaint of the plaintiffs in said action, pursuant to the stipulation of the parties to said action hereto annexed.

Dated St. Paul, 1st June, 1861.

R. R. NELSON,
U. S. Dist. Judge.

A true record. Attest:

GEO. W. PRESCOTT, *Clerk.*

And afterwards, to wit, on the first day of July, in the year
24 one thousand eight hundred and sixty-one, came the said defendant, Gardner P. Drury, by Hale & Bond, his solicitors, and filed in the clerk's office of said court, at said St. Paul, his answer to the said plaintiffs' cross-bill of complaint in words and figures following, to wit:

District Court of the United States for the District of Minnesota.

The answer of Gardner P. Drury, defendant, to the cross-bill of complaint of Thomas Foster and Hannah C. Foster, his wife, complainants.

This defendant, reserving to himself all right of exception to the said cross-bill of complaint, for answer thereto, admits that this defendant did, on or about the 27th day of February, A. D. 1861, as in said cross-bill in that behalf stated, file his bill of complaint in this court against the said complainants, and one William L. Banning, and one Edward F. Parker, as defendants, of the purport and effect and for the purpose in said cross-bill set forth.

And he admits that a writ of subpœna was duly issued out
25 of this court, pursuant to the prayer of this defendant, said bill of complaint of the purport and effect in said cross-bill stated, and that said writ of subpœna was duly served on the said complainants, as in said cross-bill in that behalf is alleged.

And this defendant admits that at the time of the filing of said cross-bill the said complainants had not, nor had either of them, answered, pleaded, or demurred to this defendant's said bill of complaint, or any part thereof, and that said cause was then still pending, and had not yet been heard, and that then the time for said complainants to appear and answer the said bill had not yet arrived, as in said cross-bill in that behalf is stated.

And this defendant saith that it is not true, as the said complainants hath in their said cross-bill in that behalf stated, that the said complainant, Hannah C. Foster, never at any time, either jointly or alone, executed, acknowledged, or delivered to this defendant the said mortgage, in this defendant's said bill of complaint described and set forth, or any mortgage upon said real estate, or any
26 part thereof: but, on on the contrary thereof, this defendant saith, and avers the truth to be, that the said Hannah C. Foster, jointly with her said husband, the said Thomas Foster, did

execute, acknowledge, and deliver to this defendant the certain mortgage mentioned and described in this defendant's said bill of complaint at the time, and of the purport and effect and for the purpose in said bill of complaint in that behalf stated; to which bill of complaint this defendant craves leave to refer for greater particularity and certainty in said behalf.

And this defendant admits that at and during the time, in that behalf mentioned in said cross-bill, the said complainants were husband and wife.

And this defendant saith that, except as he is informed by said cross-bill, he has no knowledge that the said Hannah C. Foster was at and during the time in said cross-bill mentioned, and is now, the owner in fee simple in her own right, as her seperate estate and property, of the whole of the real estate, or of any part
27 thereof, mentioned and described in this defendant's said bill of complaint; but this defendant saith that, he has good reason to believe, and does verily believe, and so charges the truth to be, that the aforesaid real estate, although the title thereof may now stand, and may heretofore have stood, in the name of the said Hannah C. Foster, is, and was at the time of the execution of said mortgage, and has always been in truth and in fact, the property of the said Thomas Foster, and that if the title of said real estate has heretofore stood, and does now stand, in the name of the said Hannah C. Foster, the same has been so held, and is now so held, by her solely in trust and for the use, benefit, and behoof of the said Thomas Foster.

And this defendant saith that, except as he is informed by said cross-bill, he has no knowledge whether or not the said Thomas Foster, at the time in said cross-bill mentioned, did propose and intend to borrow, upon mortgage of said real estate, the sum of six
28 or seven hundred dollars, and did propose to said Hannah C. Foster to execute with him a mortgage upon said real estate for the purpose of securing such loan if made. And that, except as he is informed by said cross-bill, he has no knowledge whatever as to the preparation of a mortgage upon said real estate in blank as in said cross-bill in that behalf is stated. And has no knowledge whatever as to the presentation of the same to the said Hannah C. Foster, and as to her being importuned and solicited to sign, seal, and acknowledge the same, as in said cross-bill in that behalf is stated. And has no knowledge whatever as to the signing, sealing, and acknowledging of the said blank mortgage by the said Hannah C. Foster and Thomas Foster, as in said cross-bill in that behalf is set forth. But this defendant denies that the said blank mortgage, if any such there was afterwards, was ever delivered to this defendant with the blanks filled or otherwise, as in said cross-bill is stated. And he denies that said blank mortgage, if any such there was, is the
29 same mortgage, except only the filling of the blanks therein, set up in this defendant's said bill of complaint. And he denies that the said mortgage in the said bill of complaint set forth was signed, sealed, executed, or acknowledged by the said complainants,

or either of them, in the form, mode, or manner, or under the circumstances in said cross-bill stated. And he denies that said mortgage was ever executed, acknowledged, or delivered otherwise than is stated in this defendant s said bill of complaint.

And this defendant denies that the said Thomas Foster negotiated said loan with this defendant, or executed or delivered said notes to this defendant in manner and form as in said cross-bill the said complainants have in that behalf alleged.

And this defendant denies that the said Thomas Foster on said negotiation did deliver to this defendant said mortgage in blank as the said complainants have in their said cross-bill set forth. And he denies that any blanks were filled, or any word or words, figure
30 or figures, were inserted or written by this defendant, or by any other person, in said mortgage after the delivery thereof to this defendant, as the said complainants in their said cross-bill have in that behalf stated, or otherwise. But, on the contrary thereof, this defendant saith that when the said mortgage in this defendant's said bill of complaint set forth was executed and delivered to this defendant the same contained no blanks whatever, but was in all respects complete and precisely as the same was at the filing of the said bill of complaint, and as the same is therein described and set forth.

And this defendant denies that the said loan was effected, or that the said notes were made or delivered, or that the said mortgage was executed, acknowledged, or delivered in manner and form as the said complainants have in their said cross-bill in that behalf stated, or otherwise than as this defendant has in his said bill of complaint in that behalf set forth.

And this defendant denies that he ever had any knowledge
31 that the said mortgage, or any mortgage or paper, was ever signed, sealed, or acknowledged by said Hannah C. Foster in blank, or that any blanks were filled up therein without her authority, knowledge, privity, or consent, as in said cross-bill in that behalf stated.

And this defendant saith that the said mortgage set up in this defendant's said bill of complaint was in all respects duly executed, acknowledged, and delivered to this defendant by the said complainants for the purposes and in the manner and form in said bill of complaint stated, and with the full knowledge, consent, and approbation of the said Hannah C. Foster, and that she then well knew the purposes aforesaid for which said mortgage was executed.

And this defendant saith that he hath no knowledge for what purpose the said money was borrowed of this defendant, or whether or not the same was borrowed or used for the benefit of the said Hannah C. Foster, but he saith that the same was borrowed and used
32 with the full knowledge and assent of the said Hannah C. Foster.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said cross-bill charged, without this that there is any other matter, cause, or thing in the said complainants' said cross-bill of complaint contained, material or

necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied, is true to the knowledge or belief of this defendant.

All which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct; and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

GARDNER P. DRURY, *Defendant.*
HALE & BOND, *Solicitors for Def't.*
H. R. BIGELOW & ALLIS & PECKHAM,
Of Counsel for Def't.

33 And afterwards, to wit, on the fifth day of August, in the year of our Lord one thousand eight hundred and sixty-one, came the said complainants, and by their said solicitor filed in the said clerk's office of said court at St. Paul, their replication to the said defendant's answer to said cross-bill, in the words and figures following, to wit:

District court of the United States for the district of Minnesota.—In equity.

The replication of Thomas Foster and Hannah C. Foster, his wife, complainants, to the answer of Gardner P. Drury, defendant, to the cross-bill of said Thomas Foster and Hannah C. Foster, his wife.

These repliants, saving and reserving unto themselves all and all manner of advantage of exception to the manifold insufficien-
34 cies of said answer, for replication thereto, say, that they will aver and prove their said cross-bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by these repliants: without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things these repliants are and will be ready to aver and prove, as this honorable court shall direct; and humbly pray, as in and by their said cross-bill they have already prayed.

C. D. GILFILLAN,
Solicitor for Complainants.
JAMES GILFILLAN,
Of Counsel.

SAINT PAUL, *August 5th*, 1861.

The foregoing replication may be filed without the signatures of the complainants, with the same force and effect as though such signatures were affixed thereto.

HALE & BOND,
Solicitors for Defendant.

ST. PAUL, *Aug. 5th*, 1861.

35 And afterwards, to wit, at rules held in the clerk's office of said court, on the fifth day of August, in the year of our Lord one thousand eight hundred and sixty-one, the following proceeding, among others, was had, to wit:

GARDNER P. DRURY *vs.* THOMAS FOSTER, HANNAH C. FOSTER, his wife, *et al.*	Original bill.
THOMAS FOSTER & HANNAH C. FOSTER, his wife, *vs.* GARDNER P. DRURY.	Cross-bill.

On motion of the solicitors in this cause, it is ordered that a commission to such person or persons as shall be named by the judge of this court, to take the testimony of such witnesses as shall be
36 produced by the parties herein, upon oral interrogatories by the solicitors of said parties, they hereby agreeing to take said testimony upon such interrogatories.

HALE & BOND,
Solic'rs for Pl'ffs.
C. D. GILFILLAN,
Solic'r for Def's.

And afterwards, to wit, on the eighth day of August, in the year of our Lord one thousand eight hundred and sixty-one, at rules held in said clerk's office, the following proceeding, among others, was had, to wit:

GARDNER P. DRURY *vs.* THOMAS FOSTER and HANNAH C. FOSTER, his wife, and WM. L. BANNING.	Original bill.
THOMAS FOSTER and HANNAH C. FOSTER, his wife, *vs.* GARDNER P. DRURY.	Cross-bill.

On reading and filing the stipulation of the respective par-
37 ties agreeing thereto, it is hereby ordered, that the time for taking the proofs of the several parties upon the original bill and cross-bill in this cause be, and the same is hereby, extended to the 20th day of August, 1861.

That said original bill and cross-bill be heard together, and that proofs and pleadings in the one cause be read in the other, so far as admissible under the pleadings.

That a commission issue to George W. Prescott, esq., who is hereby appointed a commissioner to take the proofs of the several parties to said original and cross-bills upon oral interrogatories.

That the defendant in said cross-bill and his solicitors are hereby

required to produce and deposit with said commissioner, for the inspection of the complainants in said cross-bill, their solicitor, counsel, and witnesses, the mortgage described in said original
38 bill and said cross-bill and the answer thereto, at such time and place as shall be appointed by said commissioner for taking the proofs of said complainants on said cross-bill.

R. R. NELSON,
U. S. Dist. Judge.

A true record. Attest: JAMES W. TAYLOR, *Clerk.*

And afterwards, to wit, on the twenty-fifth day of September, in the year of our Lord one thousand eight hundred and sixty-one, at rules held in the clerk's office of said court, the following proceeding was had, to wit:

GARDNER P. DRURY
vs.
THOMAS FOSTER and HANNAH C. FOSTER, his wife, and WILLIAM L. BANNING. } Original bill.

THOMAS FOSTER and HANNAH C. FOSTER, his wife,
vs.
GARDNER P. DRURY. } Cross-bill.

On filing the stipulation and agreement to that effect be-
39 tween Hale and Bond, solicitors for complainants in original bill, and for defendant in cross-bill, and of C. D. Gilfillan, solicitor for defendants in original bill, and for the complainants in cross-bill, it is ordered that publication of the testimony taken in these causes do pass in the said clerk's office.

And afterwards, to wit, at rules held in said clerk's office on the fourth day of October, in the year one thousand eight hundred and sixty-one, the following proceeding was had:

GARDNER P. DRURY
vs.
THOMAS FOSTER and HANNAH C. FOSTER, his wife, and WILLIAM L. BANNING. } Original bill.

THOMAS FOSTER *et al.*
vs.
GARDNER P. DRURY. } Cross-bill.

40 And now comes the plaintiff in said original bill, by Allis & Peckham, his counsel, and on their motion it is ordered that these causes be, and they hereby are, set down for hearing at the next term of this court, to wit, October term, 1861; and also ordered that the usual subpœna to hear judgment issue.

And afterwards, to wit, at a stated term of said court, held at Saint Paul, in and for the district of Minnesota, of the October term

thereof, in the year one thousand eight hundred and sixty-one, on the ninth day of said term, the following proceeding, among others, was had, to wit:

GARDNER P. DRURY *vs.* THOMAS FOSTER and HANNAH C. FOSTER, his wife, WILLIAM L. BANNING and EDW'D F. PARKER.	Original bill. Foreclosure of mortgage in chancery.
THOMAS FOSTER and HANNAH C. FOSTER, his wife, *vs.* GARDNER P. DRURY.	Cross-bill.

41 These causes this day came on to be heard upon the bills, answers, and testimony herein.

Whereupon Lorenzo Allis, esquire, solicitor and of counsel for the plaintiff in the original bill, and for the defendant in the cross-bill, moves the court to suppress such portions of the depositions on file in said causes as were received subject to objection for incompetency.

And thereupon, on consideration, it is ordered by the court that the motion heretofore made to suppress such portions of the depositions on file in these causes as were received subject to objection for incompetency, be denied, and that said testimony be received.

And afterwards, to wit, on the nineteenth day of said term, the following proceeding, among others, was had:

THOMAS FOSTER and HANNAH C. FOSTER, his wife, *vs.* GARDNER P. DRURY.	Cross-bill.

42 This cause came on to be further heard at this term, and was argued by counsel, and thereupon, on consideration thereof, it was ordered, adjudged, and decreed as follows, to wit:

That the alleged mortgage mentioned and described in the cross-bill of complaint herein, to wit, the mortgage or instrument purporting to be a mortgage executed by the said Thomas Foster and Hannah C. Foster to the said Gardner P. Drury, to secure the sum of twelve thousand seven hundred and eighty-five dollars and forty cents, according to the condition of five several promissory notes, dated the 27th day of April, A. D. 1857, and recorded on the 25th day of May, 1857, at 10 o'clock in the forenoon, as a mortgage, in the office of the register of deeds in and for the county of Dakota and State of Minnesota, in book D of mortgages, on pages 188, 189, and 190, and purporting to convey to said Gardner P. Drury all that tract or parcel of land lying and being in the said State, then
43 Territory, of Minnesota and county of Dakota, described as follows, to wit: Lots six (6) and seven (7) and the southwest

quarter of the northeast quarter in section number twenty-seven, (27,) in township number one hundred and fifteen (115,) north of range number seventeen (17) west, in the Red Wing land office district, is null and void as to the said Hannah C. Foster, and is hereby set aside, annulled, and discharged as against the said Hannah C. Foster, and her right, title, interest, or estate in the said real estate hereinbefore described.

R. R. NELSON,
U. S. Dist. Judge.

44 And there are on file in this cause, and endorsed as filed on the 27th day of August, A. D. 1861, the commission and return thereto, and depositions and exhibits in words following, to wit:

The President of the United States to George W. Prescott, esq., greeting:

You are hereby authorized and appointed to take the testimony, in writing, of such witnesses as may be produced before you in the above-named cases, on the original and cross-bills, pending in the district court of the United States for the district of Minnesota, before the judge thereof, pursuant to the following order, to wit:

"On reading and filing the stipulation of the respective parties agreeing thereto, it is hereby ordered."

"That the time for taking the proof of the several parties upon the original bill and cross-bill in this cause be, and the same
45 is hereby, extended to the 20th day of August, 1861."

"That said original bill and cross-bill be heard together, and that proof and pleadings in the one cause be read in the other, so far as the same are admissable under the pleadings."

That a commission issue to George W. Prescott, esq., who is hereby appointed a commissioner to take the proofs of the several parties to said original and cross-bills, upon oral interrogatories.

That the defendant in said "cross-bill and his solicitors are hereby required to produce and deposit with said commissioner for the inspection of the complainants in said cross-bills, their solicitor, counsel, and witnesses, the mortgage described in said original bill and said cross-bill, and the answer thereto, at such time and place as shall be appointed by said commissioners for taking proof of said complainants on said cross-bill."

"R. R. NELSON,
"*U. S. Dist. Judge.*"

"A true record. Attest:

"JAMES W. TAYLOR, *Clerk.*"

You will cause the deposition of witnesses to be signed by them; at the foot thereof you will add a certificate subscribed by
46 yourself, stating that the same were sworn to, and subscribed by said witnesses, and the time and place where the same were taken; which said examination of witnesses so taken, with your certificate thereto attached, you will send directed to our clerk of

our said district court of the United States for the district of Minnesota, at Saint Paul, in said district, sealed with the names of the parties litigant endorsed thereon, on or before the first Monday of October next, together with this suit.

[SEAL.] Witness the Hon. Rensselaer R. Nelson, judge of our said court, at St. Paul, in said district, this 3d day of September, A. D. 1861, and of our independence the 86th.

[SEAL.] JAMES W. TAYLOR, *Clerk.*

DISTRICT COURT OF THE UNITED STATES,
District of Minnesota, ss:

GARDNER P. DRURY
vs.
THOMAS FOSTER & HANNAH C. FOSTER. } Original bill.

47 THOMAS FOSTER & HANNAH C. FOSTER
vs.
GARDNER P. DRURY. } Cross-bill.

DISTRICT OF MINNESOTA, *ss:*

And now, to wit, this (27th) twenty-seventh day of August, Anno Domini eighteen hundred and sixty-one, before George W. Prescott, commissioner in the above causes, at the office of Allis & Peckham, Saint Paul, in said district, come the above parties, by their respective counsel; and thereupon the plaintiff in the cause first above entitled, by his counsel, puts in evidence the papers hereto annexed, marked Exhibit I, II, III, IV, V, respectively, which are admitted by defendants' counsel, to be the notes described in plaintiff's bill of complaint, and in defendants' answer thereto, and also in the cross-bill in the cause secondly above entitled. Puts also in evidence the paper hereto annexed, marked Exhibit "VI," which is by defendants admitted to be the mortgage referred to in the pleadings mentioned.

48 Thereupon A. M. Hayes is produced as a witness on behalf of the plaintiff, and, *and* being by said commissioner first duly sworn, deposes and says, in answer to interrogatories:

I. Are you acquainted with the defendants in this cause, and the grantors in the mortgage shown you? (Exhibit VI here shown to witness.) And if so, how long have you known them?

Answer. I am. I have known them five or six years.

II. Examine the signature "A. M. Hayes," purporting to be one of the witnesses to this mortgage, and state if you know whose signature that is; and if so, whose it is.

Answer. I do know. It is my signature.

III. State if that deed was signed and sealed in your presence by the parties purporting to have signed and sealed it.

Answer. It was.

IV. State if there was any other witness present beside yourself when the deed was so signed and sealed?

Answer. James F. Dicken was present when the grantor, Hannah C. Foster, signed and sealed the deed, and Oren T. Hayes was
49 present when the grantor, Thomas Foster, signed and sealed it.

V. Are the two signatures purporting to be those of James F. Dicken and Oren T. Hayes, witnesses to the deed, the signatures of those two persons, to your knowledge?

Answer. They are.

VI. Did they witness it in your presence after the signing and sealing by the grantors?

Answer. They did.

VII. Do you know where James F. Dicken, one of the witnesses to this deed, is?

Answer. I do not.

VIII. Do you know if James F. Dicken is in the State of Minnesota at the present time, or if he has been in this State within the past five or six months?

Answer. I do not.

IX. After the execution of this deed, as you have mentioned, to whom was it delivered?

Answer. It was delivered to me.

X. Do you recollect to whom you delivered it?

Answer. I think I delivered it to Thomas Foster, one of the grantors. That is my impression, but I cannot state positively whether it was delivered by me or by brother. I can't recollect exactly how it went out of my hands.

50 XI. Examine the acknowledgement on this deed, and state if you know whose signature is affixed to the acknowledgement.

Answer. It is my signature.

XII. Were you a notary public at that time?

Answer. I was.

XIII. Was the seal after your name upon this instrument your official seal at that time?

Answer. It was.

XIV. Was this acknowledgement, to which your name and official seal is annexed, made before you at the time it purports to have been made?

Answer. It was.

XV. Were you requested by the grantors to witness their signing and sealing of the deed at the time you witnessed it?

Answer. I can't say whether I was directly asked, but it was done in their presence, and at their implied request.

Cross-examination by defendants' counsel.

X-ex. I. Where did you live at the time of signing and sealing exhibit "VI?"

Answer. I lived in Hastings, Dakota county, in this State.

51 X-ex. II. Where did Thomas Foster and Hannah C. Foster live at that time?

Answer. They lived in said Hastings.

X-ex. III. Where was that instrument signed and sealed?

Answer. In said Hastings.

X-ex. IV. Was it signed and sealed by both the grantors at the same time and in the same place?

Answer. It was signed and sealed by both on the same day, but Thomas Foster signed and sealed it at my office, and Hannah C. Foster signed and sealed it at the dwelling-house of Thomas Foster.

X-ex. V. Which signed and sealed first?

Answer. Thomas Foster.

X-ex. VI. By whom was it taken to the dwelling for Mrs. Foster to sign?

Answer. By me.

X-ex. VII. After she signed it, what did you do with it?

Answer. I took it to my office.

X-ex. VIII. How long did you have it at your office after it was signed and sealed?

Answer. I think it was several days, because I think the doctor, after he signed it, went to Saint Paul and remained several
52 days. My recollection is not distinct about it. I mean Doctor Thomas Foster, one of the grantors.

X-ex. IX. Do you recollect whether you delivered it personally to Thomas Foster, or sent it by letter?

Answer. I do not.

X-ex. X. What was it left in your hands for?

Answer. It was left in my hands to deliver to Thomas Foster.

X-ex. XI. While it was in your hands, do you recollect Mrs. Foster calling upon you in regard to it?

Answer. I do not. I don't recollect of ever seeing her about it at all after she acknowledged it. Possibly she might, but I have no recollection of it.

X-ex. XII. Did you subscribe your name to it as witness in Mrs. Foster's presence?

Answer. I think I did.

X-ex. XIII. Do you know in whose handwriting the written part of the deed is?

Answer. Part of it is in my handwriting, and part of it is in the handwriting of the defendant, Thomas Foster.

X-ex XIV. Look at the works "Gardner P. Drury, of Massachusetts," in the fourth line, and state if you know whose handwriting it is.

Answer. I think it was Thomas Foster's handwriting, from
53 what I know of his writing. I did not see him write it.

X-ex. XV. Look at the words "twelve thousand seven hundred and eighty-five $\frac{0}{100}$," on the fifth and sixth lines of the mortgage, and state if you know whose handwriting it is.

Answer. I think it is Thomas Foster's.

X-ex. XVI. Look at the words "Gardner P. Drury," in the twenty-first line, and state if you know whose handwriting they are in.

Answer. I think in Thomas Foster's.

X-ex. XVII. In whose handwriting are the words "twelve thousand seven hundred and eighty-five $\frac{40}{100}$," in the twenty-third line?

Answer. In think in Thomas Foster's.

X-ex. XVIII. In whose handwriting are the words "being five in number," in the twenty-fifth line?

Answer. I think in Thomas Foster's.

X-ex. XIX. In whose handwriting is the word "fifty," in the thirty-eight line?

Answer. Thomas Foster's, I think.

X-ex. XX. Is there any other part of the deed in his handwriting, or in other person's than yourself?

Answer. The word "notes," in lines twenty-five and thirty-one, was written by me, all but the letter "S;" the letter "S" in
54 those two words is the handwriting, I think, of Thomas Foster. The rest of the written portion of the body of the deed is in my handwriting.

X-ex. XXI. State if you know when the portions in the handwriting of Thomas Foster were written. (Objected to as not being matter of X-ex. to any matters elicited in the examination in chief, and also as immaterial.)

Answer. I do not know.

X-ex XXII. State if you know whether those portions were written before the signing and sealing. (Objected to as previous question, and also that the witness can't contradict his own certificate of acknowledgement on the deed.)

Answer. I think they were not.

X-ex. XXIII. Were they written before you delivered the deed to Thomas Foster, after the signing and sealing? (Objected to as above to last quest.)

Answer. They were not, I think. I am quite positive they were not.

X-ex. XXIV. When did you write the part of the deed that is in in your handwriting? (Objected to as above.)

Answer. On the 27th day of April, 1857.

X-ex. XXV. At the time this deed was signed, sealed, and
55 acknowledged, what did Mrs. Foster say about it, if anything? (Objected to as above.)

Answer. She said something like this: that she was fearful the speculation the doctor was going into would not come out right; that she did not like to mortgage that place, but that the doctor wanted to raise a few hundred dollars, or several hundred dollars, or something to that effect—I don't recollect the exact expression she used—and that she did not like to refuse him, so she consented to sign the mortgage. That is the amount of what she said, but I don't recollect her language. I state, as nearly as I can remember, what she said, so as to give the meaning she conveyed.

(This testimony objected to, so far as it is intended to offer declarations of defendant, Mrs. Foster, in evidence.)

Re-direct ex. by plaintiff.

R. D. I. Do you recollect whether you gave the deed to defendant, Thomas Foster, at all?

Answer. I think I gave it to him myself, but am not positive.

A. M. HAYES.

Subscribed and sworn to before me this 27th August, A. D. 1861.

GEO. W. PRESCOTT.
Commissioner.

56 And thereupon plaintiff puts in evidence mortgage deed hereto annexed, marked exhibit "VI;" also offers in evidence the acknowledgement upon it, and the register of deeds certificate endorsed upon the back of it; and defendant admits that same was recorded, according to said certificate upon the back.

Plaintiff rests.

And thereupon defendants introduce their testimony, as follows:

Erastus S. Edgerton, being first duly sworn, says:

I. Do you know the parties in this suit?

Answer. I know the parties to this suit, Gardner P. Drury and Thomas Foster; do not recollect as I know Hannah C. Foster.

II. Did you know Mr. Foster and Mr. Drury in the spring of 1857?

Answer. I think I did; I would not be positive what year.

III. Look at this mortgage and these notes. (Exhibit from I to VI inclusive, heretofore put in evidence, shown witness.) Did you know them at the time this loan evidenced by these notes and mortgage was negotiated?

57 Answer. I knew Gardner P. Drury and Thomas Foster; I don't remember that I knew Mrs. Foster; if I ever did I have forgotten it.

IV. Did you act for either of the parties in negotiating the loan?

Answer. I assisted both parties more or less.

V. Where you present when the papers were delivered?

Answer. I don't recollect; wouldn't be positive; I may and may not have been.

VI. How long had Mr. Drury been here that spring at the time these papers were delivered?

Answer. A few days; don't remember how many.

VII. Do you recollect the fact of this writing being written and signed? Guarranty purporting to be signed by Alex. Ramsey on the back of exhibit VI shown witness. (Objected to by pl'ff's, Drury's, counsel as being impertinent and immaterial.)

Answer. I think I do. (Objected to as not responsive to the question.)

VIII. Do you know how long they were negotiating the loan before the papers were delivered?

58 (Objected to as impertinent and immaterial.)

Answer. A few days; I cannot tell how many.

IX. Was this paper, exhibit VI, in your possession during any of the time?

Answer. I cannot tell.

X. Do you know in whose handwriting the body of these notes is, exhibits I to VI?

Answer. I think it is the handwriting of H. M. Ketcham, who was clerk for me at the time.

XI. Where was the loan negotiated?

Answer. I do not know positively; I recollect Mr. Drury's going to Hasting's, and that is the way I recollect they were a few days negotiating the loan; and I recollect they were in my office, but I couldn't say where it was negotiated.

XII. Do you know what he went to Hastings for?

Answer. I understood he went to look at the property which he was to take a mortgage of; I understood it from Drury or Thomas Foster.

XIII. Where you told that during the negotiation?

Answer. I should think so; yes.

59 XIV. How long after that was the negotiation consummated, by the delivery of the papers?

Answer. I can't recollect; the whole thing is indistinct with me.

XV. Do you recollect taking or sending this exhibit VI for record?

Answer. I do not.

XVI. Did you see this mortgage before the negotiations were completed?

Answer. I may and may not; can't tell.

XVII. Did you see the notes before they were negotiated?

Answer. I don't know anything about it; the only thing I know about it is, they are in the handwriting of my clerk

XVIII. What did you do in assisting the parties in making the loan?

Answer. I had been spoken to in the first place by Thomas Foster to assist him about getting money; this was before Gardner P. Drury came here, or before I knew he had money at all events, for I had tried to get the money of others before Drury spoke to me. Then Gardner P. Drury spoke to me to know who wanted to hire

60 money. I told Thomas Foster that Gardner P. Drury wanted to lend, and told Drury that Foster wanted to hire. That is the substance.

XIX. Is that all you did?

Answer. I probably had conversation with both parties, but can't give the details.

XX. While the negotiation was going on, did you hear anything said between Foster and Drury about the blanks in the mortgage?

Answer. I did not.

XXI. Did you hear any conversation in the presence of Mr. Drury in regard to any blanks in it?

Answer. I don't recollect that I did.

XXII. Do you recollect whether this guaranty was written before the delivery of the notes and mortgage?

(Objected to as impertinent and irrelevant, and that there is no guaranty in evidence.)

Answer. I think it was written before, yet I am not very positive about it.

XXIII. Do you recollect when the money was advanced?

Answer. I do not. It seems strange that I do not, for it is most reasonable to suppose that I should have cashed Drury's
61 drafts; and yet I have not the most distant recollection of it.

XXIV. Were you informed by any person that this mortgage was signed and sealed with the name of the mortgagee, and the amount in blank, before the delivery of it?

(Objected to as indefinite and uncertain, also as impertinent, immaterial, and incompetent evidence.)

Answer. I was.

XXV. State who informed you and what that information was.

(Objected to, for same reasons as above.)

Answer. Thomas Foster; the information was, that he had bro't up a mortgage from home executed in blank, and that he was authorized to fill it out.

XXVI. Did you make any other loan for Foster during that spring?

(Objected to as immaterial.)

Answer. Not that I recollect.

XXVII. Is this book your original book of entry of your daily transactions in spring of 1857? (Book shown witness.)

(Objected to as indefinite, immaterial, and incompetent evidence.)

Answer. It is the original book of entry of the daily trans-
62 actions of Mackubin & Edgerton.

XXVIII. That was the name of your firm engaged in the banking business, was it?

Answer. It was.

Defendants, by their counsel, here offer in evidence from such book of entry the entry under date of May 22, 1857, in the following words and figures:

Profit and loss. Com. ch'g'd Foster for loan, 100.

(Admission objected to as incompetent and immaterial.

X-examined by plaintiff's counsel.

X-ex. I. Did you charge a commission to either Drury or Foster for the negotiation of this loan?

Answer. I have no recollection of charging any, except from this book.

X-ex. II. According to that book, you charged the defendant, Foster, a hundred dollars for the negotiation of this loan, did you not?

Answer. So it appears from this book. I had forgotten it.

63 X-ex. III. And according to that book the defendant, Thomas Foster, paid you a hundred dollars for negotiating that loan, did he not?

Answer. He did.

X-ex. IV. Did Drury pay you anything, or did you charge him anything for negotiating this loan?

Answer. I do not recollect of charging him anything or of his paying anything.

X-ex. V. Do you find any charge, entry, or memorandum in that book of Mr. Drury's paying you anything, or of his being charged anything by you for negotiating this loan?

Answer. I do not.

X-ex. VI. Have you examined the book for the purpose of finding such charge?

Answer. I have examined the book and do not find the name of Mr. Drury.

X-ex. VII. You have that book now before you, have you not?

Answer. I have. It is the cash-book of Mackubin & Edgerton, and commences July 9th, 1856, and terminates June 10th, 1857.

64 X-ex. VIII. Is the entry or memorandum which has been given in evidence from that book by defendants' counsel, in your handwriting?

Answer. It is not.

X-ex. IX. Is the entry which has just been given in your handwriting?

Answer. It is not.

X-ex. X. Have you any recollection of that entry, or the matter of that entry, independent of this book?

Answer. Nothing except what that brings to my mind. I don't recollect about the entry, nor the fact of the entry, until I saw it in this book.

X-ex. XI. Have you any recollection of this entry being made independent of the book?

Answer. I have not.

ERASTUS J. EDGERTON.

Subscribed and sworn to before me this 17th August, A. D. 1861.

GEO. W. PRESCOTT,
Commissioner.

65 Defendants' counsel also offers in evidence the guarranty on the back of mortgage, marked Exhibit VI, which guarranty is marked Exhibit VII.

And thereupon the said several parties in the said causes first above entitled declared that they had no more testimony to produce before me, the said commissioner heretofore named, and I accordingly return the foregoing testimony as the whole of the testimony, in connection with the exhibits therein testified to and hereto annexed introduced by said parties.

I certify also that the said parties, plaintiff and defendants, by their

counsel, appeared before me, at the time and place and in all respects as above set forth, pursuant to stipulation, and that the foregoing interrogatories and cross-interrogatories were proposed by the counsel for the several parties as above set forth, and were by me reduced to writing as they were severally propounded; that the answers of the witnesses were also by me reduced to writing as they were given to the said interrogatories and cross-interrogatories; that the questions and answers were then by me read to the witnesses, and were
66 thereupon signed by them; and that said witnesses were, previous to testifying, each duly sworn in said cause to depose the whole truth and nothing but the truth.

To all which witness my hand, this twenty-seventh day of August, A. D. 1861.

GEO. W. PRESCOTT,
Commissioner.

Commissioner's fees, $5 00.

Exhibit I.

$1,062\frac{50}{100}$. SAINT PAUL, *April 27th*, 1857.

On the twenty-seventh day of May, 1858, (without grace,) for value received, I promise to pay to the order of Gardner P. Drury one thousand sixty-two and $\frac{50}{100}$ dollars, If not paid at maturity, to draw interest at the rate of twenty-five per cent. per annum until paid. Payable in Saint Paul with current rate of exchange on New York.

THOMAS FOSTER.

Indorsed on the back "Gardner P. Drury."

STATE OF MINNESOTA,
Ramsey County ss:

On the day of the date hereof I, Delos A. Montfort, notary public, residing in the city of St. Paul, by lawful authority duly com-
67 missioned and sworn, presented, at the request of the holder thereof, the original note hereto annexed at the office of the maker of said note, where the same is made payable, and demanded payment thereof, which was refused.

Whereupon, I, the said notary, did protest, and by these presents do solemnly protest, against the maker and endorser of the said note, and all others concerned, for all exchange, re-exchange, costs, damages, and interest suffered, and to be suffered, for want of payment thereof.

And I do further certify, that on the day of the date hereof I served notices of the presentment and demand of payment of the said note and of the protest thereof as aforesaid for non-payment on the following named persons, parties to said note, by depositing the same in the post office in ———, directed to them at their reputed place of residence, and directed to the post office nearest to reputed place of residence, as follows:

On Thomas Foster, directed to him at Saint Paul.

On Gardner P. Drury, directed to him at Saint Paul.

68 On Alex. Ramsey, he having guarranteed the mortgage by which this note is secured, directed to him at Saint Paul.

In testimony whereof, I have hereunto subscribed my name and affixed my seal of office, this twenty-seventh day of May, in the year one thousand eight hundred and fifty-eight.

[SEAL.] D. A. MONFORT,
Notary Public, Minnesota.

Exhibit II.

$1,062 50. SAINT PAUL, *April 27th*, 186 .

On the twenty-seventh day of May, 1859, (without grace,) for value received, I promise to pay to the order of Gardner P. Drury one thousand sixty-two $\frac{50}{100}$ dollars. If not paid at maturity, to draw interest at the rate of twenty-five per cent. per annum until paid. Payable in Saint Paul with current rate of exchange on New York.

THOMAS FOSTER.

Endorsed: Gardner P. Drury.

STATE OF MINNESOTA,
Ramsey County, ss:

69 On the day of the date hereof I, William Markoe, notary public, residing in the city of St. Paul, by lawful authority duly commissioned and sworn, presented, at the request of the holder thereof, the original note hereto annexed to Thomas Foster personally, where the same is made payable, and demanded payment thereof, which was refused.

Whereupon, I, the said notary, did protest, and by these presents do solemnly protest, against the maker and endorser of the said note, and all others concerned, for all exchange, re-exchange, costs, damages, and interest, suffered and to be suffered, for want of payment thereof.

And I do further certify that on the day of the date hereof I served notices of the presentment and demand of payment of the said note, and of the protest thereof as aforesaid, for non-payment, on the following named persons, parties to said note, by depositing the same in the post office at St. Paul, directed to them at their reputed place of residence, and directed to the post office nearest to their reputed place of residence, as follows:

On Thomas Foster, directed to him at St. Paul, Minn.

On Gardner P. Drury, directed to him at St. Paul, Minn.

On Alexander Ramsey, as guarrantor on the mortgage, directed to him at St. Paul, Minn.

70 In testimony whereof, I have hereunto subscribed my name and affixed my seal of office, this twenty-seventh day of May, in the year one thousand eight hundred and fifty-nine.

[SEAL.] WILLIAM MARKOE,
Notary Public, Minnesota.

Exhibit III.

$1,097 90. SAINT PAUL, *April 27th*, 1857.

On the 27th day of November next, (without grace,) for value received, I promise to pay to the order of Gardner P. Drury, one

thousand ninety seven & $\frac{00}{100}$ dollars. If not paid at maturity, to draw interest at the rate of twenty-five pr. cent. per annum until paid. Payable in Saint Paul with current rate of exchange on New York.

THOMAS FOSTER.

Fndorsed: Pay to the order of Mackubin & Edgerton, St. Paul, Minnesota.

GARDNER P. DRURY.

Pay Gardner P. Drury, or order, without recourse.

MACKUBIN & EDGERTON.

"Gardner Drury."

71 MINNESOTA,
Ramsey County, ss:

On the day of the date hereof I, Delos A. Montfort, notary public, residing in the city of Saint Paul, by lawful authority duly commissioned and sworn, presented, at the request of the holder thereof, the original note hereto annexed to the maker of said note, where the same is made payable, and demanded payment thereof, which was refused.

Whereupon I, the said notary, did protest, and by these presents do solemnly protest, against the maker and endorser of the said note, and all others concerned, for all exchange, re-exchange, costs, damages, and interest suffered, and to be suffered, for want of payment thereof.

And do further certify, that on the day of the date hereof I served notices of the presentment and demand of payment of the said note, and of the protest thereof, as aforesaid, for non-payment, on the following named persons, parties to said note, by depositing the same in the post office in the city of Saint Paul, directed to them at their reputed place of residence, and directed to the post
72 office nearest to their reputed place of residence, as follows:

On Thomas Foster, directed to him at Saint Paul. On Gardner P. Drury, directed to him at Boston, Mass.

In testimony whereof, I have hereunto subscribed my name, and affixed my seal of office, this 27th day of November, in the year one thousand eight hundred and fifty-seven.

D. A. MONFORT,
Notary Public, Minnesota.

Exhibit IIII.

$8,500 00. SAINT PAUL, *April 27th*, 1857.

Two years and one month from date, (without grace.) for value received, I promise to pay to the order of Gardner P. Drury, eight thousand five hundred dollars. If not paid at maturity to draw interest at the rate of twenty-five pr. cent. pr. annum until paid. Payable in Saint Paul with current rate of exchange on New York.

THOMAS FOSTER.

Endorsed: Gardner P. Drury.

STATE OF MINNESOTA,
County of Ramsey, ss:

On the day of the date hereof I, William Markoe, notary public, residing in the city of Saint Paul, by lawful authority duly commissioned and sworn, presented, at the request of the holder thereof the original note hereto annexed, to Thomas Foster personally, where the same is made payable, and demanded a payment thereof, which was refused.

Whereupon, I, the said notary, did protest, and by these presents do solemnly protest, against the maker and endorser of the said note, and the guarrantor on the mortgage to secure the same, and all others concerned, for all exchange, re-exchange, costs, damages, and interest suffered, and to be suffered, for want of payment thereof.

And I do further certify, that on the day of the date hereof I served notices of the presentment and demand of payment of the said note, and of the protest thereof, as aforesaid, for non-payment, on the following named persons, parties to said note, by depositing the same in the post office in St. Paul, directed to them at their reputed place of residence, and directed to the post office nearest to their reputed place of residence, as follows:

On Thomas Foster, directed to him at St. Paul, Minn.

On Gardner P. Drury, directed to him at St. Paul, Minn.

On Alexander Ramsey, as guarrantor on the mortgage, directed to him at St. Paul, Minn.

In testimony whereof, I have hereunto subscribed my name and affixed my seal of office, this twenty-seventh day of May, in the year one thousand eight hundred and fifty-nine.

[SEAL.] WILLIAM MARKOE,
Notary Public, Minnesota.

Exhibit V.

$1,062\frac{50}{100}$. ST. PAUL, *April 27th*, 1857.

On the twenty-seventh day of November, 1858, (without grace,) for value received, I promise to pay to the order of Gardner P. Drury one thousand sixty-two and $\frac{50}{100}$ dollars. If not paid at maturity, to draw interest at the rate of twenty-five per cent. per annum until paid. Payable in Saint Paul with current rate of exchange on New York.

THOMAS FOSTER.

Endorsed: Pay to the order of E. S. Edgerton.
GARDNER P. DRURY.

Pay Gardener P. Drury, or order, without recourse to
E. S. EDGERTON.

Gardner P. Drury.

STATE OF MINNESOTA,
County of Ramsey, ss:

On the day of the date hereof I, Geo. H. Edgerton, notary public, residing in the city of St. Paul, by lawful authority duly commissioned and sworn, presented, at the request of the holder thereof

the original note hereto annexed, at the office of the said Thomas Foster, where the same is made payable, and demanded payment thereof, which was refused.

Whereupon, I, the said notary, did protest, and by these presents do solemnly protest, against the maker and endorser of the said note, and all others concerned, for all exchange, re-exchange, costs, damages, and interests suffered, and to be suffered, for want of payment thereof.

And I do further certify, that on the day of the date hereof I served notices of the presentment and demand of payment of
76 the said note, and of the protest thereof as aforesaid, for non-payment, on the following named persons, parties to said note, by depositing the same in the post office in the city of Saint Paul, directed to them at their reputed place of residence, and directed to the post office nearest to their reputed place of residence, as follows:

On Gardner P. Drury, directed to him at Boston, Mass.

On Alex. Ramsey, directed to him Saint Paul, Minn.

In testimony whereof, I have hereunto subscribed my name and affixed my seal of office, this twenty-seventh day of November, in the year one thousand eight hundred and fifty-eight.

GEO. H. EDGERTON,
Notary Public, Minnesota.

Exhibit VI.

This indenture, made this twenty-seventh day of April, in the year of our Lord one thousand eight hundred and fifty-seven, between Thomas Foster and Hannah C. Foster, his wife, of the county of Dakota and Territory of Minnesota, parties of the first part, and Gardner P. Drury, of Massachusetts, party of the second part,
77 witnesseth: That the said parties of the first part, in consideration of the sum of twelve thousand seven hundred and eighty-five $\frac{40}{100}$ dollars to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, and convey to the said party of the second part, his heirs and asigns, forever, all that tract or parcel of land lying and being in said county of Dakota, described as follows, to wit: lots six (6) and seven (7) and the southwest quarter of the east quarter of section No. twenty-seven, in township No. one hundred and fifteen north, of range No. seventeen west, in the Red Wing land district: To have and to hold the same, together with all the hereditaments and appurtenances thereunto in anywise appertaining. And the said Thomas Foster and Hannah C. Foster, his wife, parties of the first part, do covenant with the said party of the second part, his heirs and assigns, as follows: First, they are lawfully seized of said premises; second, that they have good right to convey the same; third, that the same are free from all incumberances; and fourth,
78 that the said party of the second part, his heirs and assigns, shall quietly enjoy and possess the same, and that they will warrant and defend the title to the same against all lawful claims:

Provided, nevertheless, That if the said Thomas Foster and Hannah C. Foster, his wife, parties of the first part, their heirs, executors, or administrators, shall well and truly pay, or cause to be paid, to the said Gardner P. Drury, party of the second part, his executors, administrators, or assigns, the sum of twelve thousand seven hundred and eighty-five $\frac{4}{100}$ dollars, according to the conditions of said Thomas Foster's promissary notes, being five in number, bearing even date herewith, then this deed to be null and void; otherwise to be in full force and effect. But if default shall be made in the payment of said sum of money, or the interests or any part thereof, at the time hereinbefore specified for the payment thereof, the said parties of the first part
in such case do hereby authorize and fully empower the said party
79 of the second part, his heirs, executors, administrators or assigns,
to sell the said hereby granted premises at public auction, and convey the same to the purchaser in fee simple, agreeably to the statute in such case made and provided, and out of the moneys arising from such sale to retain the principal and interest which shall be then due on the said notes, together with all the costs and charges, and pay the overplus (if any) to the said parties of the first part, their heirs, executors, administrators, or assigns.

And the said Thomas Foster and Hannah C. Foster, his wife, parties of the first part, do hereby further covenant and agree to and with the said party of the second part, his heirs, executors, administrators, and assigns, that they will pay all taxes and assessments, of every nature, that may be assessed on said premises previous to the day appointed in pursuance of any law for the sale of lands for town, city, county, territorial or State taxes; and that if the said party of the second part shall have occasion to and shall commence a foreclosure of this mortgage deed, for condition broken, by a sale
79 as above provided, there shall be taxed, allowed, and paid to
the said party of the second part an attorney or solicitor's fee of fifty dollars in addition to the fees allowed by law.

In testimony whereof, the said parties of the first part have hereunto set their hands and seals, the day and year above written.

THOMAS FOSTER. [SEAL.]
HANNAH C. FOSTER. [SEAL.]

Signed, sealed, and delivered in the presence of—
A. M. Hayes.
James F. Dicken.
Oren T. Hayes.

Territory of Minnesota,
County of Dakota, ss:

Be it known, that on this twenty-seventh day of April, A. D. 1857, before me personally appeared Thomas Foster and Hannah C. Foster, his wife, the signers and sealers of the foregoing deed, and acknowledged the signing and sealing thereof to be their voluntary act and deed, for the uses and purposes expressed.

And the said Hannah C. Foster, wife of the said Thomas
80 Foster, being examined separate and apart from her said husband, and the contents of the foregoing deed made known to

her by me, she then acknowledged that she executed the same freely, and without fear or compulsion from any one.

A. M. HAYES, [SEAL.]
Notary Public for Minnesota Territory.

Mortgage deed.—Thomas Foster and wife to Gardner P. Drury.

OFFICE OF REGISTER OF DEEDS,
County of Dakota.

I hereby certify that the within deed was filed in his office for record on the twenty-fifth day of May, at 10 o'clock a. m., and was duly recorded in book "D" mgs., pages 188, 189, and 190.

JOHN KENNEDY,
Register of Deeds.

81 *Exhibit VII.*

For value received, I hereby guarrantee that the property described in the within mortgage will sell for enough to pay the note and interest accompanying said mortgage, at any time said mortgage may be foreclosed after maturity.

ALEX. RAMSEY.

ST. PAUL, *May* 21, 1857.

82 And afterwards, to wit, on the twenty-fifth day of April, in the year eighteen hundred and sixty-two, came the said plaintiff, Gardner P. Drury, by his said solicitors, and filed in the clerk's office of said court, at St. Paul, his petition for appeal in the words and figures following, to wit:

GARDNER P. DRURY, plaintiff,
vs.
THOMAS FOSTER and HANNAH C. FOSTER, his wife, and WILLIAM L. BANNING, defendants. } Original suit.

THOMAS FOSTER and HANNAH C. FOSTER, his wife, plaintiffs and appellees,
vs.
GARDNER P. DRURY, defendant and appellant. } Cross-suit.

To the honorable the Supreme Court of the United States:

The petition of appeal of Gardner P. Drury, defendant in above-named cross-suit, and appellant, respectfully showeth, that
83 heretofore, to wit, at the October term of the year A. D. 1861, of the district court of the United States for the district of Minnesota, a final decree was rendered by said court, sitting in equity, in a certain cross-suit, above named, therein pending, wherein your petitioner was defendant, and Thomas Foster and Hannah C. Foster, his wife, were plaintiffs, which said decree is wholly erroneous and ought to be reversed, as your petitioner is advised.

And that the matter thereby in dispute, exclusive of costs, exceeds the sum of two thousand dollars.

Wherefore, this appellant appeals, from the said decree of the said court, to the Supreme Court of the United States next to be holden at the city of Washington, in the District of Columbia, and prays that the said decree, and a transcript of the bill of complaint, answer, pleadings, depositions, evidence, and all other proceedings of what kind soever, in the said cross-suit, may be duly transmitted to the said Supreme Court, and that said Supreme Court may receive, hear, and determine said appeal, and that the said decree may be reversed, and that such other or further order and decree may be made by the said Supreme Court in the premises as the nature of the case
84 may require and as may be agreeable to equity, and that this appellant may be restored to all things which he hath lost by the said decree. And this appellant will ever pray, &c.

HALE & BOND, *Solicitors.*
ALLIS & PECKHAM,
Of Counsel for Def't & Appellant.

And afterwards, to wit, on the twenty-fifth day of April, A. D. eighteen hundred and sixty-two, came the said plaintiff, by his said solicitors, and filed in the said clerk's office at St. Paul, the following order, to wit:

District court of the United States for the district of Minnesota.

GARDNER P. DRURY, plaintiff, *vs.* THOMAS FOSTER and HANNAH C. FOSTER, his wife, and WILLIAM L. BANNING, defendants.	Original suit.
THOMAS FOSTER and HANNAH C. FOSTER, his wife, plaintiffs, *vs.* GARDNER P. DRURY, defendant.	Cross-suit. In equity.

85 In this cause, this 25th day of April, A. D. 1862, came the defendant in the above cross-suit, by his solicitors, Messrs. Hale & Bond, and exhibiting his petition, praying for an appeal to the Supreme Court of the United States next to be holden at the city of Washington, in the District of Columbia, on the first Monday of December, A. D. 1862, from the final decree heretofore rendered in said cross-suit, and showing that the matter in dispute, exclusive of costs, exceeds the sum of two thousand dollars, and furnishing the security required by law, moved that an appeal be allowed in accordance with the prayer of the said petition; and thereupon, it is ordered that the appeal prayed for be, and the same is hereby, allowed, and that the appellant serve the usual citation according to law.

R. R. NELSON,
United States Judge.

86 UNITED STATES OF AMERICA,
District of Minnesota, ss:

And now, to wit, at a stated term of the district court of the United States for the district of Minnesota, held at Saint Paul on the first Monday of October, in the year one thousand eight hundred and sixty-two, on the first day of said term, it was ordered, that the record in this cause, together with others, be, and the same is hereby, transfered to the circuit court of the United States for the district of Minnesota, in pursuance of an act of the Congress of the United States approved July 15, 1862, entitled "An act to amend an act of the third of March, A. D. 1837, entitled An act supplementary to an act entitled An act to amend the judicial system of the United States.

87 UNITED STATES of AMERICA,
Circuit Court of the United States for the District of Minnesota, ss:

I, H. E. Mann, clerk of said court for the district of Minnesota, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing is a true and complete transcript of the record, process, pleadings, orders, final decree, and all other proceedings in said cause, and also of all the depositions, exhibits, and proofs taken therein, as appears from the original records and files of said court. And I do further certify and return that I have annexed to said transcript, and do hereby transmit therewith, the original citation of appeal, together with the proof of the service thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of the said court at Saint Paul, in the district aforesaid, this twenty-first day of November, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh.

[SEAL.] H. E. MANN, *Clerk.*
By J. N. CARDOZO, *Deputy Clerk.*

Filed December 30, 1862.

Supreme Court of the United States.

GARDNER P. DRURY, Appellant,
vs.
THOMAS FOSTER & HANNAH S. FOSTER, his wife, Appellees. } Original Suit.

THOMAS FOSTER & HANNAH S. FOSTER, his wife, Appellees,
vs.
GARDNER P. DRURY, Appellant. } Cross Suit.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, SITTING IN EQUITY.

Brief, Points and Argument of Counsel for Appellant.

HENRY HALE and LORENZO ALLIS,
Of Counsel for Appellant.

SAINT PAUL:
PIONEER PRINTING COMPANY
1864.

Supreme Court of the United States.

GARDNER P. DRURY, Appellant,
vs.
THOMAS FOSTER & HANNAH S. FOSTER, his wife, Appellees. } Original Suit.

THOMAS FOSTER & HANNAH S. FOSTER, his wife, Appellees,
vs.
GARDNER P. DRURY, Appellant. } Cross Suit.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA, SITTING IN EQUITY.

Brief, Points and Argument of Counsel for Appellant.

STATEMENT OF THE CASE.

PLEADINGS.

The plaintiff in the original suit brings his bill in the ordinary form for the foreclosure of a mortgage executed by the defendants therein jointly to the plaintiff, on the 27th day of April, A. D. 1857, of real estate situate in the county of Dacotah, State of Minnesota, to secure the principal and interest of a loan then made by such plaintiff to the defendant, Thomas Foster, of the sum of $8,500, payable in two years and one month thereafter, with semi-annual interest at the rate of twenty-five per cent. per annum; to evidence which the said Foster then executed his five several promissory notes to said Drury, bearing date on said day—four of said notes being for the interest installments on said loan, and the

other for the principal; amounting in the aggregate to the sum of $12,785.40. The whole of this sum, together with interest on the several notes from the dates respectively of their maturity, is claimed to be due, and the plaintiff prays for a sale of the mortgaged property to pay his debt and costs, and for a judgment against defendant, Thomas Foster, for any unsatisfied balance. The defendants are required by the bill to answer *without oath;* and they accordingly put in their joint answer without oath. This answer admits the loan, except as to the date, which it is averred was the 21st day of May, A. D. 1857, instead of the 27th day of April of that year. The answer avers the mortgaged property to have been at the time of the execution of mortgage, and to be still the separate estate of the Defendant, Mrs. Foster; and states that the mortgage was executed under the following circumstances, to-wit:

That on the said 27th day of April, A. D. 1857, (the date of the mortgage) the said defendants being then husband and wife, the said defendant, Thomas Foster, desired to borrow upon mortgage of said premises $600 or $700, and proposed to said defendant, Mrs. Foster, to execute with him a mortgage upon said real estate for the purpose of procuring such loan. Accordingly she was induced to execute with him, and duly acknowledge on the said day, at Hastings, in Dacotah county, a mortgage of said real estate - the name of the grantee and the amount of the mortgage being left blank in the instrument. That afterwards, on the 21st day of May, A. D. 1857, the said defendant, Thomas Foster, having said blank mortgage in his possession, did at St. Paul negotiate the loan mentioned in the bill of complaint, and did execute the said notes; and also did deliver to the said plaintiff the said mortgage without the knowledge, privity or consent of his said wife—the said blanks being filled immediately before or immediately after the delivery, the said defendants averring that they do not know which, nor by whom, but that it was done without the consent, privity or knowledge of said wife. Upon this alleged state of facts the defendants claim that the mortgage was never executed as to the wife. The record of this mortgage, as alleged in plaintiff's bill, is admitted by the answer, as also the amount claimed in said bill to be due thereon.

The plaintiff put in his general replication to this answer.

The defendants filed their cross-bill against the plaintiff, setting up substantially the same matters as those stated in their answer to the original bill, requiring answer *without oath* to their cross bill, and praying for the cancellation of said mortgage. To this Drury answered, re-asserting the

matters before alleged in his bill of complaint, expressly denying that the mortgage was delivered to him in blank, and all knowledge, information, or belief that it was ever so executed, and fully putting at issue all the material matters of the cross bill, and the plaintiffs in the cross suit filed their general replication.

Under stipulation the evidence taken was read in both suits, and they were both heard together.

EVIDENCE.

The evidence on behalf of the plaintiff in the original suit, consists of the several promissory notes described in the bill of complaint, and marked exhibits I, II, III, IV and V, respectively, which are admitted by the defendants' counsel to be the notes described in the bill (see return of commissioner to take testimony, first page); and the execution of which is admitted by the pleadings; and also of the mortgage admitted to be the one referred to in the pleadings, and marked exhibit VI. (See return of Commissioner, first page.) The execution of this mortgage is fully proved by one of the witnesses thereto, who was also the notary public before whom it was acknowledged. (See testimony of A. M. Hayes in commissioner's return.) The certificate of the acknowledgment is also in evidence, and is fully proved, being in the usual form and test. (See exhibit VI.) The certificate of the record of the mortgage on the back thereof is also in evidence. (See exhibit VI.) It is admitted by defendants' counsel that the mortgage was recorded as stated in the certificate. (See Commissioner's return, last paragraph before plaintiff rests.)

The mortgage, certificate of acknowledgment and certificate of record are all in the usual form, and precisely as set up in the plaintiff's bill.

It appears by the testimony of the witness, Hayes, that the mortgage was signed, sealed and acknowledged on the day it purports to have been, at Hastings, in the county of Dacotah, by both the grantors, in the presence of the witnesses whose names are appended to it—by Thomas Foster first, at said Hayes's office, and by Mrs. Foster afterwards, at her dwelling in the absence of her husband; that Mrs. Foster, after she had executed and acknowledged the mortgage as aforesaid, delivered it to said Hayes, to be delivered to said Thomas Foster, which delivery was duly made.

This witness also states upon his cross-examination that the written part of the body of the deed is in his own handwriting, except the name of the grantee, "Gardner P. Drury,"

the sum named in the consideration clause, and the sum and description of the notes expressed in the defeasance or condition clause, which he states are in the handwriting of the defendant, Thomas Foster. (See responses to cross-interrogatories, 13-20 inclusive, addressed to this witness.)

In response to cross interrogatories 21-24 inclusive, (which were objected to by plaintiff's counsel,) the witness further stated that he did not know when the portions of the mortgage in the handwriting of defendant Foster were written—thought they were not written before the signing and sealing was quite positive that they were not written when he delivered the mortgage to defendant, Thomas Foster, after the signing and sealing; that the portion of the instrument in witness' handwriting was written on the 27th day of April, A.D. 1857.

The twenty fifth cross interrogatory to this witness (objected to by plaintiff's counsel,) and the witness' response to the same, are as follows, viz.: "X Ex. 25. At the time this deed was signed, sealed and acknowledged, what did Mrs. Foster say about it, if anything?

"Answer—She said something like this: That she was fearful the speculation the Doctor was going into wouldn't come out right; that she did not like to mortgage that place, but that the Doctor wanted to raise a few hundred, or several hundred dollars, or something to that effect—I don't recollect the exact expression she used—and that she didn't like to refuse him; so she consented to sign the mortgage. That is the amount of what she said, but I don't recollect her language. I state as nearly as I can remember what she said, so as to give the meaning she conveyed." This testimony was also objected to, so far as it was intended to offer declarations of defendant, Mrs. Foster, in evidence.

The evidence on the part of the defendants consisted of the testimony of Erastus S. Edgerton, who states that he was a banker at the date of the mortgage, and assisted both parties in negotiating this loan more or less; witness had been spoken to in the first place by defendant, Thomas Foster, to assist him about getting money: this was before Drury came here, or before witness knew he had money to loan. When Drury spoke to witness to know who wanted to hire money, witness told him of Foster, and informed Foster of Drury; witness does not recollect of being present when the papers were delivered; thinks they were a few days negotiating the loan before the delivery of the papers, but the whole thing is now indistinct to witness; recognizes the notes to be in the handwriting of one of witness' clerks; don't recollect of seeing either the notes or mortgage before their delivery; heard

nothing said between Drury and Foster while the negotiation was going on, in regard to any blanks in the mortgage; does not recollect when the money was advanced.

This witness also stated, under objection, however, from Drury's counsel, that he was informed by defendant, Foster, that he, Foster, had brought up a mortgage from home, executed in blank, and that he was authorized to fill it out. (See interrogatory 25 to this witness, and response.)

The cash book of the banking house of this witness was also produced by defendants' counsel, and an entry therein put in evidence, subject to objection by Drury's counsel. (See interrogatories 27 and 28 to this witness.) By this entry it appeared, under date of 22d May, A.D. 1857, that $100 had been collected of defendant, Thomas Foster, charged him for negotiating a loan, the witness, Edgerton, however, having no recollection of such a charge independently of the book, and the entry not being in his handwriting. (See responses to cross-interrogatories 8 11 inclusive, addressed tothis witness.)

This witness also stated that he charged Drury no commission for the loan. (See responses to cross-interrogatories 1-7 inclusive.)

No evidence whatever was introduced by defendants to establish their allegation that the mortgaged property was and is the separate estate of Mrs. Foster.

HEARING.

Prior to the hearing on the merits the Court below was moved by the appellant's counsel to suppress that portion of the deposition of the witness, Hayes, embracing his cross-examination respecting the blanks in the mortgage at the time of the signing, sealing and acknowledgment thereof, on the grounds of objection interposed at the taking of the testimony, viz.:

1st. That the same was not a proper matter of cross-examination.

2nd. That the evidence was incompetent; and the Court refused to suppress the same, and the original and cross suits were then heard together, and in the original suit decree was rendered dismissing plaintiff's bill as to defendant, Mrs. Foster, and in all other respects granting the relief prayed. In the cross suit decree was rendered, granting the relief asked by the cross bill. Both the original and cross suits are here on appeal taken by Drury.

POINTS AND AUTHORITIES.

I.—The Court below erred in refusing to suppress that portion of the deposition of the witness, Hayes, embracing his cross-examination respecting the blanks in the mortgage at the time of the signing, sealing and acknowledgment thereof.

1. This evidence tends to contradict, and is introduced for the express purpose of contradicting, the certificate of acknowledgment and showing the same to be false; whereas, on the highest ground of public policy such certificates are held to be *conclusive* evidence of the matters they contain, and they can neither be *aided* nor *disproved* by parol testimony, except perhaps, in cases of fraud or imposition.

Elliott *vs.* Peirsol, 1 Pet., 336, 338.
Jamison *vs.* Jamison, 3 Wharton, 468-469 and cases cited.
Wharton *vs.* Baily, 1 Binn., 470.
Jordan *vs.* Jordan, 9 Serg. & Rawle, 268.
Barnett *vs.* Barnett, 15 Serg. & Rawle, 73.
Bissett *vs.* Bissett, 1 Har. & McHen., 211.
Ridgeley *vs.* Howard, 3 Har. & McHen., 321.
Hartly *vs.* Frost, 6 Texas, 208.
Bancks *vs.* Ollerton, 26 Eng. Law & Eq. R., 515.

2. But assuming that the officer's certificate of acknowledgment is not *conclusive* evidence of its contents, and that it may be aided or disproved by evidence *aliunde*, it would be repugnant to good conscience and opposed to sound public policy, to admit the *parol* testimony of the officer himself to establish the falsity of his own solemn and public official certificate; that is to say, to allow his statements made under his oath as a witness, to outweigh and disprove his solemn declarations made under his official oath as a public officer. *Nemo, allegans suam turpitudinem, est audiendus.*

II.—This evidence being suppressed there remains no evidence whatever in favor of the defence and case of the appellee, Mrs. Foster, and the decrees of the Court below, so far as the same are in her favor are manifestly erroneous.

But even if this testimony be received, still said decrees are erroneous, so far as they sustain the defence and case of Mrs. Foster.

1. The appellee, Mrs. Foster, is estopped from claiming that she did not execute this mortgage, not only as against this appellant, but also as against the world.

Having deliberately and in due form signed, sealed and acknowledged this mortgage as her deed, knowing that there were at the time certain blanks in it, and knowing for what purpose the blanks were left therein, and how and by whom

the mortgage was to be used, and the mortgage having been used for the purpose intended, and delivered in all respects complete and perfect to the appellant by her co-grantor, Mrs. Foster cannot now be permitted to say that said mortgage is *not her deed.*

Nevin *vs.* Belknap, 2 Johns., 589.
Packard *ve.* Sears, 6 Ad. & Ellis, 469
Welland Canal Co. *vs.* Hathaway, 8 Wend., 483.
Dazell *vs.* Odell, 3 Hill, 219 and 221-5.
Waren *vs* Town of Jacksonville, 15 Ill., 236.
Neely *vs.* Rucker, 6 Black., 391.
Flagg *vs.* Mann *et al.*, 2 Sumner, 509, last paragraph.
Gaines *vs.* Gilbert, 14 Pet., 326.
Chess *vs.* Chess, 1 Penn. 22.
Rowell *vs.* Hayden, 40 Maine, 582.
Ingraham *vs.* Grigg, 13 S. & R., 22.
Gilbert *vs.* North American Ins. Co., 23 Wend., 46, last paragraph.

See also authorities cited above under head I.

Also, 2 Smith's Leading Cases, 660-3, and authorities there cited.

2. No evidence whatever was introduced or offered in support of the appellee's allegation that the mortgaged property was the separate estate of Mrs. Foster, which is the basis of her claim to relief.

3. Even if there existed sufficient grounds for Mrs. Foster to obtain the relief she seeks in the premises, she would not be permitted to ask such relief *conjointly* with her husband, under the circumstances of the case, but would be required to seek it *adversely* to him.

Haztly *vs.* Frost, 6 Texas, 208.
Story's Eq., 563, s. 63.

4. But even upon the case and the evidence presented by the appellees, the mortgage is valid as against Mrs. Foster.

First. The mortgage was not executed till *delivered.*

Until *delivery* was made the mortgage was in *fieri* and was no deed.

Interlineations and *alterations* made in deeds during the process of their execution and before their execution, becomes complete by delivery, are not interlineations or alterations at all within the sense in which these terms are used in the authorities and rules applicable to this subject

In the case at bar it is not pretended that any alteration or interlineation was made in the mortgage *after* delivery. The instrument was in all respects perfect and without appearance of alteration or interlineation when delivered to the appellant.

The blanks in the mortgage were all filled *before* its execu-

tion, that is *before* it became a deed. The case at bar, therefore, does not really present the question of the alteration or interlineation of a *deed*.

Second. The delivery of the mortgage by Mrs. Foster to her husband, with full knowledge on her part of the existence of the blanks, and of the use to be made of the instrument, was ample authority from her to him to fill such blanks and complete the execution of the instrument by delivery.

Duncan *vs.* Hodges, 4 McCord, 239.

Wooley *vs.* Constans, 4 Johns., 55.

Texira *vs.* Evans, cited in Master *vs.* Miller, 1 Anstruther, 229.

Exparte Decker, 6 Cow., 59.

Exparte Kerwin, 8 Cow., 118.

Holbrook *vs.* White, 13 Wend., 587.

Commercial Bank of Buffalo *vs.* Kortwright, 22 Wend., 354.

Smith *vs.* Crocker, 5 Mass., 539.

Wiley *vs.* Moar, 17 Serg. & Rawle, 439.

Lockhart *vs.* Roberts, 3 Bibb. (Ky.), 361.

Anderson *vs.* Lewis, 1 Freem. ch. 178.

United States *vs.* LeBarron, 19 How., 73.

Miller *vs.* Stewart, 9 Wheat., 708-719.

Speak *et al.*, *vs.* United States, 9 Cranch., 28.

1 Greenleaf's Ev., sec. 566.

See 1 Smith's Leading Cases, 959-967, and note to Warring *vs.* Smythe, 2 Barb. Ch. R., 119, for general collation of the authorities on this subject.

Story's Partnership, sec. 122, and authorities cited in notes.

Skinner *vs.* Dayton, 19 Johns., 513.

Cady *vs.* Shepherd, 11 Pick., 400.

Dunlap's Paley on Agency, 168.

Story's Agency, sec. 73 and sec. 127 and note (1) on page 148 to sec. 127.

White vs. Vermont and Mass., R.R. Co., 21 How., 575.

Third. The entire silence and acquiescence of Mrs. Foster for so long a period after the delivery and public record of this mortgage, ought to be held to be a complete and conclusive ratification thereof on her part, even upon the assumption that the instrument was originally delivered to the appellant without due authority from her.

5. It was claimed by the opposite counsel on the hearing in the Court below that, inasmuch as by the statute of Minnesota the due acknowledgment of her deed of conveyance by a married woman, was essential to its validity, Mrs. Foster must have *re-acknowledged* this mortgage *after* the blanks were filled, to have rendered it her deed.

This position, on the assumption of the correctness of this construction of the statute, would be well taken, if the case at bar were one where the blanks in the instrument had been filled *after* its delivery to the grantee, that is after its execution; for in such case, inasmuch as the acknowledgment by Mrs. Foster would be essential to the execution of the deed; so, in like manner, her re acknowledgment thereof would be essential to its re-execution. But in the case at bar, there was no re-execution of the deed, and no occasion for such re-execution. The blanks were filled *before* delivery to the grantee, and even before the instrument left the hands of the grantors, and consequently *before* execution. Hence the principle contended for has no application to the case at bar.

6. Finally, it will be seen that the equities of the case are altogether with the appellant.

ARGUMENT.

I. That portion of the deposition of the witness, Hayes, the notary before whom the mortgage in this case was acknowledged, relating to the blanks in the instrument at the time of the acknowledgment, should have been suppressed; for the evidence is introduced for the express purpose of showing that the certificate of acknowledgment endorsed on the mortgage, made by the witness himself as notary public, is false.

1. Such certificates are *conclusive* evidence of their contents, and they can neither be *aided* nor *disproved* by parol testimony, except in cases of fraud or imposition.

This rule stands on the highest grounds of public policy, and has been frequently insisted on by the highest tribunals of the land.

In the case of Bissett *vs.* Bissett, cited above, it was held in Maryland, that no evidence can be received to invalidate the acknowledgment of a deed taken by two justices agreeably to the act of 1715, c. 47.

In the case of Ridgely vs. Howard, above cited, the same principle was again recognized in that State.

In the case of Elliott vs. Piersol, above cited, the Supreme Court of the United States held that the privy examination and acknowledgment of the deed of a *feme covert* cannot be proved by parol; and that when the clerk has made a record of his certificate of such examination and acknowledgment, he is *functus officio*, and cannot afterwards amend the certificate.

Our position is also strongly sustained by the English case above cited, of Bancks vs. Ollerton.

In the case of Hartly vs. Frosh, above cited, it was decided in a case very similar to the one at bar, that where the certificate of the privy examination of a married woman is in due form, in order to impeach its veracity it is not sufficient to allege that there was no privy examination, that the contents were not made known to her, &c.; the certificate is conclusive in the absence of an allegation of fraud or imposition; as, for instance, that there was a fraudulent combination between the notary and parties interested.

In the case of Watson vs. Baily above cited, the Supreme Court of Pennsylvania refused to admit parol testimony to make good a defective acknowledgment.

In the subsequent case of Jordan vs. Jordan, above cited, Chief Justice Tilghman, of the same court, recognizing the same principle, said: "There would be no certainty to titles if that kind of evidence were permitted. The law directs the magistrate to make his certificate in writing, and he has made it. To that the world is to look, and to nothing else." In the case of Barnet vs. Barnet, above cited, the same court reaffirms the same principle.

The case of Jamison vs. Jamison, above cited, subsequently decided by the same court, is as nearly as possible parallel to the one at bar, as this is claimed by appellees.

It is the case of a mortgage executed by husband and wife, of the separate estate of the wife to secure the debt of the husband; and in which there was an offer to prove by the testimony of the justice of the peace before whom the acknowledgment was taken, that his certificate thereof was false. The court held that the certificate of the judge or justice to the acknowledgment of a deed by a married woman, is to be judged of solely by what appears on the face of the certificate itself; and parol evidence of what passed at the time of the acknowledgment is not admissible for the purpose of contradicting the certificate. The language of the court in this case, on this point, is as follows:

"Serjeant J. The first and third bills of exceptions and a "portion of the charge of the court, raise the question, "whether the certificate of the justice of the peace of the "acknowledgment by the husband and wife, was conclusive as "to all matters legallycontained in it, so that the defendant "was not at liberty to prove by parol evidence that the mort-"gage was not acknowledged by her before the justice in the "manner it purports to have been, and thus destroy its validi-"ty. This point has not, perhaps, been expressly ruled, but the "principle has been repeatedly recognized, that the certificate

" of the judge or justice, as to the acknowledgment of a deed
" by a married woman, is to be judged of solely by what ap-
" pears on the face of the certificate itself, and that parol evi-
" dence of what passed at the time of such acknowledgment
" is not to be received except in cases of fraud and imposition.
" In Watson vs. Baily (1 Binn, 470,) the acknowledgment
" being held to be defective, and not to pass the estate to the
" wife, the defendants offered to produce evidence of parol
" declaration by the wife, that she executed the deed volun-
" tarily; and that if it was not sufficient, she would execute
" and acknowledge it over again, or do any other act to make
" the thing good. The evidence was held to be in-
" admissible. This case was recognized, and the same de-
" cision made in Jordan vs. Jordan (9 Serg. and Rawle, 268.)
" 'There would be no certainty in titles,' says Tilghman, C.
" J., 'if that kind of evidence were permitted. The law di-
" rects the magistrate to make his certificate in writing, and
" he has made it. To that the world is to look, and nothing
" else.' And again, in Barnet vs. Barnet (15 Serg. and Rawle,
" 73), he says, 'The third error assigned is in the rejection of
" parol evidence offered by the defendant to prove that when
" the defendant made her acknowledgment she knew the con-
" tents of the deed, and received eight dollars from F. Barnet
" for executing the deed. That such evidence was inadmissi-
" ble, was decided by this court in the case of Watson vs.
" Baily. There may be cases of gross fraud in which parol
" evidence would be received, unless the lands had passed in-
" to the hands of a purchaser for valuable consideration with-
" out notice of the fraud.' These decisions all show that the
" defendant is not permitted to prove by parol evidence, that
" the magistrate's certificate does not contain the whole truth,
" even when the object of such evidence is to support the
" deed. I can see no distinction between these cases and
" that in which the defendant endeavors to show by parol evi-
" dence that the certificate of the magistrate contains what is
" not the truth, and thus falsify it for the purpose of destroy-
" ing the deed. The judge or justice of the peace in taking
" an acknowledgment acts judicially, not ministerially. The
" law imposes on him the duty of ascertaining, by his own
" view and examination, the truth of the matters to which
" he is to certify, and points out precisely his duty. Having
" thus entrusted him to see that the proper forms are observ-
" ed, his solemn certificate that they have been observed, on
," the faith of which parties act, contracts are proceeded in,
," moneys are paid, and deeds accepted, must (in the absence
" of fraud or collusion,) be considered as entitled to full faith
" and credit; and cannot, without rendering titles to real es-

"tate exceedingly insecure, be left at any distance of time "afterwards to the uncertainty and frailty of parol proof, and "to all the mistakes, prejudices, imperfections and hazards "that attend it. For these reasons I am of opinion that the "court below was right in refusing to permit the plain- "tiff to produce parol evidence to controvert the magistrate's "certificate, and in charging the jury that it was conclusive "evidence that the defendant acknowledged the mortgage as "required by law."

The same principle has been recognized and laid down in other States, and may be regarded as too firmly established both upon principle and authority to be now questioned. The high policy of it is too apparent to require illustration or argument, if, indeed, it had not been so clearly and fully set forth in the cases to which we have referred.

And here it may be remarked, that it will not do for appellees to attempt to evade the force and application of these authorities and the principle enunciated by them in the present case, by saying that the evidence in question does not contradict, and is not intended to contradict the official certificate of acknowledgment in the present instance.

This evidence is introduced for the avowed purpose of showing that at the time of the signing, sealing and acknowledgment of the mortgage there were certain blanks in it, and this is done upon the avowed theory that, there being such blanks at such time in the mortgage, this deed was *no deed*, at least so far as defendant Mrs. Foster was concerned. If this theory be correct, and the facts are as alleged, the certificate of acknowledgment is of course *false* both in its terms and spirit, and the express object and effect of the evidence in question would be to establish its falsity. If, on the contrary, this theory be not correct, as we think we shall abundantly show—if it be immaterial in what *order* the several acts of signing, sealing, acknowledging and delivering a deed, which constitute the *execution* thereof, are pursued, provided that when the *final* act of delivery takes place the instrument is perfect; if such be the true theory, as we think is entirely clear both upon principle and authority—the evidence in question is of course wholly *immaterial* and *irrelevant*, and must therefore be rejected on that ground.

The evidence in question, therefore, if material and relevant at all, contradicts, and must be intended to contradict, the official certificate of the acknowledgment of a deed, and must therefore be rejected on the highest grounds of public policy. If irrelevant and immaterial, it is, of course, inadmissible, upon the most elementary principles of evidence.

2. The evidence in question is also incompetent and there-

fore inadmissible, because, even assuming that the certificate of acknowledgment was not conclusive, and might be aided or disproved by other evidence, it would be repugnant to the most common sense of justice and opposed to sound public policy to allow the officer himself to prove the falsity of his own solemn official certificate. It would be against all conscience to allow a public officer to come into court, and by his own parol testimony to contradict and disprove the truth of his own solemn official records, which have been duly and regularly made under the sanction of his official oath and seal, without even the pretense on his part of any mistake, or imposition or fraud practiced against him in the premises.

Which statement of the officer in such case is to be believed? The one he solemnly makes for the purpose of public record, under the sanction of his official oath and seal, or the one he makes upon the witness' stand in court? As a matter of speculation or conscience, the two statements might be taken as precisely counter balancing each other,—both having equally the sanction of an oath. But viewed in the light of public policy, the public record and official statement should and must stand against any and all the *private* declarations of the officer, no matter how or where made, nor under what sanctions. If the rule were otherwise, what safety would the public and third and innocent parties have? If public records and solemn official certificates, duly and deliberately made, could be contradicted and disproved by the very officer who makes them, and the sanction of whose official oath and seal they bear, without even the pretext of any mistake on his part or deception practiced on him, what becomes of the value of public records and official certificates? Of what possible utility are they? Shall not even the officer who makes them be estopped from contradicting their truth and correctness, against the public who are invited to put faith in them, and against parties who actually have put faith in them, and have acted upon the faith so placed in them? Besides, on what principle can the statement, made by a person as a witness under oath, be held to *disprove* the declaration made by the same person as a public officer under his official oath? Is there any difference in point of solemnity and sanctity between the two statements in the eye of the law?

Comp. Stat. Minn., p. 133.

Upon either of the grounds above taken, that portion of the deposition of the witness Hayes embracing his testimony relative to the blanks in the mortgage at the time the same was signed, sealed and acknowledged, should be suppressed.

This view of the matter really disposes of the case, for the

testimony in question being suppressed, there remains no evidence whatever in support of the defence and case of the appellees, nor to invalidate the plain case made for the appellant by the production and proof of the notes and mortgage, and the admissions in the pleadings and record.

II—But even if this testimony be received the decrees are erroneous.

1. The appellee, Mrs. Foster is *estopped* from claiming that she did not execute this mortgage.

According to the testimony of the appellees, the mortgage in question was duly signed, sealed, acknowledged and certified to, with the name of the grantee and the amount of the mortgage debt in blank, and was, when so signed, sealed and acknowledged, well known to both grantors to contain said blanks. The conclusion, therefore, is irresistible, that these blanks were designedly left by both grantors to facilitate the negotiation of the loan which was the avowed object of the execution of the mortgage, well known to and understood by Mrs Foster, as appears by her own declarations made to the notary public at the time, and put in evidence by herself, and because the amount and terms of the loan which her husband might succeed in effecting, and the party of whom he might make it, were at the time unknown to either grantor. The mortgage having been thus deliberately and understandingly executed in such form and for such purpose by both parties, was with the full knowledge and deliberate consideration of Mrs. Foster, delivered by her to the notary, to be by him delivered to the other grantor, her husband, which was accordingly done. Dr. Foster thereupon took the mortgage so executed to St. Paul and applied to a banker and broker to effect him a loan, and the broker duly put him in the way of negotiating the loan, and charged him his commission therefor, and in due time the loan, which is the basis of this suit, was effected, and to secure the same this mortgage, with all the blanks filled in and in all respects perfect, was delivered by said Thomas Foster to this appellant. It is shown by the testimony elicited by the appellees themselves, that the filling of the blanks is in Foster's own handwriting. There is not a particle of evidence to show that the appellant ever knew or heard, or ever had the slightest suspicion that the mortgage had contained any blanks, or was in any respect different when signed, sealed and acknowledged, from what it was when delivered to him. The appellant then caused this mortgage to be duly recorded in the proper office, located in the very town in which the appellees resided, and this public record has ever since lain in said office, and by operation of statute has been notice to the world of its contents. Ne-

vertheless, during all this time, until the filing of appellees' answer in this cause—a period of about four years—no word of remonstrance or objection was ever raised by either appellee against the validity and binding effect of this mortgage as to either grantor.

Are not, then, both grantors now *estopped* from raising such objection, either as against the public who have been invited all this time to rely upon the record, or as against the appellant, who received the mortgage and advanced his money on it in perfect good faith, and without a circumstance to excite his suspicion or lead him to inquiry?

It has been well said that in equity, where one has been silent, when in conscience he ought to have spoken, he shall be debarred from speaking when conscience requires him to be silent.

Nevin vs. Belknap, 2 Johns., 589.

Mrs. Foster having deliberately and understandingly executed and acknowledged this mortgage, and delivered it to be delivered to her husband in the manner and form and for the purpose disclosed by the testimony offered in her own behalf, and having thus not only put it in the power of her husband and co-grantor, but as it appears from her own evidence, expressly authorized him to fill the blanks and obtain the loan upon it, and having thus been the immediate means of inducing the appellant to make this loan upon the faith of the validity of the execution and acknowledgment of the mortgage —her own deliberate and voluntary acts in the premises—the doctrine of estoppel is clearly applicable to her, and she is forbidden now from denying the validity of the execution or acknowledgment of this mortgage as against this appellant.

In Packard vs. Sears, (6 Ad. & Ellis, 469), the doctrine of estoppel *in pais*, is thus laid down by Lord Denman:

"The rule of law is clear, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

See also Welland Canal Co. vs. Hathaway, 8 Wend., 483.

Dazell vs. Odell, 3 Hill, 219 and 221-5.

We think that Mrs. Foster is equally estopped upon grounds of public policy from denying this mortgage as against the world, after having *in entire silence* suffered it and the acknowledgment thereof to remain a public record in the very town of her residence for so long a period. We doubt even if a court of equity would interpose its hand in her behalf, even upon an allegation of fraud or imposition,

after she had thus, for so long a period, remained dumb in regard to the facts of her case, when she well knew that during all this time the public were reposing in entire confidence in the belief of a wholly different state of facts; certainly a court would never interfere in her behalf under such circumstances, to the prejudice of any third or innocent persons.

It is well settled that the possession of a deed by the grantee is *prima facie* evidence of its delivery.

Flagg vs. Mann, et al, 2 Sumner, 509, last paragraph.

It has also been repeatedly held that the *record* of a deed is *prima facie* evidence of its delivery.

Chess vs. Chess, 1 Penn., 22.

Rowell vs. Hayden, 40 Maine, 582.

Ingraham vs. Grigg. 13 S. and R. 22.

Gilbert vs. North American Fire Ins. Co., 23 Wend., 46, last paragraph.

In the case of Warren vs. Town of Jacksonville (15 Ill. 236) it was held that it will be presumed that deeds duly acknowledged and recorded have been delivered to and accepted by the grantee, and *that parties and privies, as well as the public are acquainted with their contents.*

It will thus be seen that all the presumptions are against the appellees in this case; and these presumptions are neither removed nor explained by the facts alleged, nor by the facts proved—neither by the *allegata* nor by the *probata* of the appellees.

Not only must we presume that this mortgage was duly delivered to the appellant, in the absence of any proof to the contrary, but we must also presume that during all this period of its record, the appellees as well as the public have been acquainted with its contents. There is no allegation or proof that during all this time Mrs. Foster was not in point of fact acquainted with the record of this mortgage and its contents; and in point of law she must be held to have had such knowledge. Then certainly she is now estopped from denying the same.

Indeed, we think she ought clearly to be held as estopped from denying the execution of this mortgage, by her voluntary and deliberate acknowledgment thereof, alone—especially when it is added that the certificate of this acknowledgment, as well as the deed itself, has been a matter of public record so long, with her entire silence in the premises. In Indiana the doctrine has been distinctly laid down, that an acknowledgment in the usual form by a *feme covert* of a conveyance before a magistrate estops her and those claiming

under her from saying that she had not freely and absolutely executed the conveyance.

McNeely vs. Rucker, 6 Black., 391.

See also authorities cited above under head I., 1.

2. The appellees have not introduced a particle of evidence to show that the mortgaged property is the separate estate of Mrs. Foster, though they have distinctly tendered this issue both in their answer to the original bill, and in their cross bill and this issue has been accepted by Drury; and it is obvious that the fact thus at issue is the basis on which rest the whole defense in the original suit, and the whole claim for relief in the cross suit. Mrs. Foster asserts no dower in the premises and claims nothing by virtue of such right.

In the case of Jamison vs. Jamison above cited, so nearly parallel with the one at bar, it was proved at the trial that the mortgaged property was the separate estate of the wife.

3. Even if sufficient grounds were presented to justify the relief of Mrs. Foster from the consequences of her own acts in the premises, we do not think such relief could be obtained under the circumstances of the case, *conjointly* with her husband; it would evidently have to be done *adversely* to her husband. No court of equity would allow the husband to be joined with the wife in a bill filed to relieve the wife from the consequences of the alleged wrongful acts of the husband. It would be unconscionable to permit the husband to join with the wife in setting up his own wrong as the ground and cause of relief to her. And we apprehend that it needs no argument to show that such a thing cannot be done.

The case of Hartly vs. Frosch above cited, is one where the wife conjointly with her husband is seeking to be relieved from a deed of trust executed by her of her separate estate, to secure her husband's debt. The court upon this point uses the following language, to wit:

"The allegation in relation to the influence exercised by the husband over the wife, and as inducing her to execute the instrument, presents no basis for equitable relief. If he has acted unfairly or iniquitously towards his wife in the transaction, he cannot join with her in an act to repudiate such act, to the injury of innocent third parties. She might have her remedy, but it would be adversely to, and not conjointly with her husband."

Chief Justice Hemphill then adds, in regard to the particular case before the court, a remark which is probably applicable to nearly all similar cases, to wit: "In fact her, or rather their statements, in relation to the deceit practiced by the husband, carry on their face an air of great improbability."

4. But even assuming that all the evidence introduced or elicited by the defendant is properly before the court; and assuming further that the appellee, Mrs. Foster, is not estopped from denying the validity of the mortgage, and that the same is fairly at issue; and assuming also what is purely a matter of assumption, that the mortgaged property was and is Mrs. Foster's separate estate,—nevertheless the validity of the mortgage as to both grantors is perfectly clear both upon authority and principle. We are asked by the appellees to believe, what we will grant for the sake of the argument, that this mortgage was duly signed, sealed and acknowledged by the appellees on the 27th day of April, A.D. 1857, with the name of the mortgagee and the amount of the mortgage left blank; that this was done with the express understanding and for the express purpose of enabling the husband to obtain a loan on it; that after its execution and acknowledgment by Mrs. Foster, she gave it to the notary to be delivered to her husband for the purpose named; that he took it to St. Paul, and some days afterwards succeeded in negotiating the loan mentioned in the Plaintiff's bill, and to secure the same delivered to said plaintiff this mortgage, with all the blanks filled, and in a perfect state—said Foster being, according to the appellee's own evidence, authorized by his wife to fill these blanks; and the appellant being, when he received the mortgage, entirely ignorant that it had, when signed, sealed and acknowledged, contained any blanks.

Mrs. Foster comes into a court of equity upon the above state of facts, and on the naked technical ground that because when she signed, sealed and acknowledged the mortgage there were certain blanks in it, therefore it is no deed as to her—without any allegation of fraud, in position or combination against her—asks that the mortgage shall be avoided. Certainly her case cannot appeal to the *favor* of the court. Is there any principle or rule of law, however dry and technical, that she can invoke in her behalf?

It is well settled that a deed executed in blank is no deed. But it is equally well settled that a deed is not *executed* until it is *delivered;* that is, that delivery is as necessary a part of the execution of a deed, as signing and sealing. Indeed, delivery is the *final* act in the execution of a deed which gives effect to all the other acts, and renders the deed operative at all, and without which there is no execution thereof. Now, if a deed be *delivered* in blank, it is no deed; but if it be *perfect* when *delivered*, it is a good deed, no matter in what order the several acts of drafting it, filling in blanks, signing, sealing and acknowledging it, have been pursued. This is wholly immaterial. It is the delivery which completes and per-

fects the execution of a deed, and makes it *effectual* for any purpose, and it is to the condition of the deed at the time of such delivery that the court alone looks for the evidence of its validity and character, as it would look to the *day* of such delivery for the actual date of the deed in case of dispute.

In the case of Duncan vs. Hodges, 4 McCord, 239, above cited, Mr. Justice Johnson, in delivering the judgment of the court, says:

"The general rule is, that if a blank be signed, sealed and "*delivered* and afterwards written, it is no deed; and the ob- "vious reason is that as there was nothing of substance con- "tained in it, nothing could pass by it. But the rule was "never intended to prescribe to the grantor the order of "time in which the several parts of a deed should be writ- "ten. A thing to be granted, a person to whom, and the "sealing and delivery are some of those which are necessary, "and the whole is consummated by the delivery; and *if the* "*grantor should think proper to reverse this order in the man-* "*ner of execution, but in the end makes it perfect before the* "*delivery, it is a good deed.*"

The apparent discrepancies and difficulties which exist in this class of cases have all arisen from not attending to the very plain distinction above taken. It is not the signing and sealing of a deed that constitute its execution, but these followed by delivery. It is of no moment or effect how many blanks are filled, or interlineations or alterations made in a deed, nor when they are made, provided they are made *before* and not *after* delivery.

In truth, interlineations and alterations made in deeds *before* delivery are not interlineations and alterations at all in the sense in which these terms are employed by the authorities on this subject. These terms are properly applied to the act of the party entitled under the deed or instrument, and usually import some design on his part to change its effect.

1 Greenl. Ev., sec. 566.

That is to say, *before* the instrument is delivered it is not a *deed in legal acceptation*, and hence its alteration is not the alteration of *a deed*. This distinction really disposes of the case at bar, for it is not pretended that the mortgage was ever changed *after* delivery, or by any party entitled under it.

There are many cases in which deeds with alterations and interlineations made in them *after* their delivery, but with the consent of the grantors, have been held good on the theory that the consent of the grantors to such alterations and interlineations amounted to a re-delivery of the deeds.

Woolley vs. Constans, 4 Johns, 55.

This is unquestionably sound doctrine. The execution of

the deeds had been completed by delivery; and consequently any alterations in them afterwards would have avoided them unless made with the consent of the grantors; and this consent, when given, was simply tantamount to a re-execution of the instruments.

But this is a very different case from the one now presented to the court. The question is, whether a mortgage deed signed, sealed and acknowledged by husband and wife, with two material blanks in it, viz: the name of the mortgagee and the amount of the debt, and delivered to the husband, one of the grantors, for the purpose of obtaining a loan on it, and with parol authority to fill the blanks and deliver it to the mortgagee, and which has been done, is a valid deed as to both grantors?

The case is of course much stronger than that of the delivery of a similar instrument to an ordinary agent for a similar purpose, and with like parol authority. For the person to whom the instrument and authority are intrusted in the present case is not only the natural and legal agent and protector of the wife, and the party without whose concurrence she is incapable of making the deed at all, but he is her co-grantor in the deed itself.

But the authorities are clear that a deed intrusted to an ordinary agent under the circumstances above mentioned, with parol authority to fill blanks therein and deliver the same, is a good deed when thus delivered.

And, indeed, it is difficult to see why a contrary view should be for a moment entertained. It has never been doubted but that parol authority was entirely sufficient for the mere delivery of a deed, and deliveries by agents have always been made upon mere parol authority. But delivery is one of the acts, and a very important act in the execution of a deed. It is the act by which each and all of the other acts necessary to the execution of the deed become operative and effectual. By it the signing, the sealing and the acknowledgment take effect. If, therefore, delivery can be made under parol authority, why may not blanks be filled in and alterations and interlineations made in deeds before their delivery by like authority? Neither of these things constitute the execution of a deed, but are merely some of the acts necessary to be performed in the execution thereof. And certainly the filling in of blanks is not more important, or of higher or more sacred character than the delivery itself.

It is true that some very early cases held that deeds which had been delivered to agents with parol authority to fill blanks, or make alterations or interlineations before delivery, and which had accordingly been done, were void on the

ground of the supposed application of the technical rule that the power to execute sealed instruments must also be under seal. The fallacy of this reasoning consists in the assumption that the filling of blanks and making interlineations in deeds and then delivering them, is *executing* them; whereas it is merely consummating and giving effect to the execution. This error has been sufficiently exposed by what we have already said. But a complete answer to this technical objection would be, that where a deed is signed and sealed in blank, and intrusted to an agent with parol instructions to fill the blanks and make delivery thereof, the authority of the agent is, to all intents and purposes, *under seal* by his possession of the deed itself, signed and sealed by the grantors or obligors. Indeed, what higher or better authority could he have than the deed itself?

But the absurd application of this technical rule in those early cases has long since been exposed and abandoned; and the sufficiency of parol authority to fill blanks, and make alterations and interlineations in sealed instruments, and to deliver the same, is now clearly and fully recognized.

A very early and a leading case on this question, and one identical in principle with the case at bar, is that of Texira vs. Evans, cited in Master vs. Miller, 1 Anstruth, 229. The case occurred before Lord Mansfield, and was this: Evans wanted to borrow £400, or so much of it as his credit should be able to raise; for this purpose he executed a bond, with blanks for the name and sum, and sent an agent to raise money on the bond; Texira lent £200 on it, and the agent accordingly filled up the blanks with the sum and Texira's name, and delivered the bond to him. On *non est factum* pleaded, Lord Mansfield held it a good deed.

This case has since, repeatedly, down to the present time, been reviewed before the highest tribunals of our country, and its principles affirmed.

In the State of New York the current of decisions is unvarying and without conflict in favor of its principles.

Among the earliest cases on this question in that State are those of Exparte Decker, 6 Cowen, 59, and Exparte Kerwin, 8 Cowan, 118. In the latter case it was held that an appeal bond drawn in blank as to the recital of the judgment, and executed by the appellant and his surety, the former giving parol authority to his surety to ascertain from the justice the amount of the judgment, and fill up the blank accordingly, and deliver the bond for both, and which was done, was a good bond. This is precisely similar to the case at bar in the respect that the agent for the insertion of the blanks and delivery of the instrument, was one of the co-obligors.

The same principle was before the court in the case of Holbrook vs. White, 13 Wend., 587, where a sealed instrument had been altered by an agent under parol authority. In that case, Mr. Justice Sutherland, in delivering the judgment of the court, says; "From the testimony of the witness to the "bond, and who made the alleged alteration in it, the infer- "ence is very strong that the words inserted and interlined by "him did not change the legal effect or character of the in- "strument. He thinks the words were *may*, or *can*, or *as-* "*sign*. The instrument is in the hands of the defendant, who "refused to exhibit it to the witness; and as he did not pro- "duce it on the trial, the presumption against the materiality "of the alteration is very much strengthened. But admitting "it to have been material, the witness by whom it was made "had competent authority for that purpose. The plaintiff "was to give security for the payment of the rent, to be ap- "proved of by one Helme. He, together with a surety, exe- "cuted a bond for that purpose, and delivered it to Robinson "as their agent, with *verbal* directions and authority to sub- "mit it to Mr. Helme; and if *he* thought any alterations or- "additions necessary, to make them. Upon his suggestion, "the words mentioned were added before the instrument was "delivered. It falls within the principle of the *cases* in which "it has been held that a bond, executed in *blank* as to a *ma-* "*terial* part, with *parol* authority to fill up the blank and de- "liver it, is good. In Texira vs. Evans, Anst. 228, cited by "Wilson, J., a bond executed in blank, as to *obligee* and "*amount*, was delivered to an agent to raise money upon, "with parol authority to fill up the blanks with the name of "the lender and the sum, and was held good. So in Exparte "Decker, 6 Cowen, 60, and Exparte Kerwin, 8 Cowen, 118, "appeal bonds executed in blank, with parol authority to an "agent to fill them up and deliver the bonds, were held valid. "Vide Woolley vs. Constant, 4 Johns. R., 58, where several "of the old cases on the subject are referred to by Judge "Thompson. These cases do not conflict with those in which "it has been held that the authority to execute *a deed* must "be under *seal*. Comyn's Dig., tit. Attorney C, 5; 1 Wen- "dell, 481, 11 Com. Law R. 251; Hanford v. McNair, 9 Wen- "dell, 54. The instrument in this case and in those referred "to, was signed and sealed by the *party*—not by the agent. "The authority was not to execute a deed, but to make cer- "tain alterations or additions to it. The instrument was "valid."

In the case of the Com. Bank of Buffalo vs. Kortright, 22 Wend., 354, the same principle was again fully recognized and affirmed. That was a case of the *blank* transfer of a certifi-

cate of stock. The holder had affixed his *name* and *seal* upon the back of the certificate, and delivered it to a third party. It was held that the transferree was authorized to fill it up by writing a transfer and a power of attorney over the signature.

This principle is also clearly enunciated in the case of Smith vs. Crooker, 5 Mass., 539. Chief Justice Parsons, in delivering the judgment in that case, where a bond had been executed by a surety before his name had been inserted in the body of the instrument, and his name being afterwards inserted therein in his absence—holding the instrument valid—pertinently remarks: "The party executing the bond, knowing that there are blanks in it to be filled up by inserting particular names or things, must be considered as agreeing that the blanks may be thus filled after he has executed the bond."

This principle is also very fully and lucidly discussed and clearly recognized in the case of Wiley vs. Moor, 17 Serg. and Rawle, 439. The opinion of the court is as follows: "The ancient principle *Shep. Touchs.*, 54, Perk. Sec. 118, and "Co. Lit., 171, that if a man seal and deliver an empty piece "of paper or parchment, albeit he do therein withal give "commandment that an obligation or other matter shall be "written in it, and this be done accordingly, yet this is no "good deed,' has been overruled in the more modern cases. "The point came before the Court of King's Bench, in Texira "vs. Evans, cited and relied on in Master vs. Miller, 1 An-"struth, 229. The case occurred before Lord Mansfield, and "was this: Evans wanted to borrow four hundred pounds, or "so much of it as his credit shou'd be able to raise; for this "purpose he executed a bond, with blanks for the name and "sum and sent an agent to raise money on the bond. Texira "lent him two hundred pounds on it and the agent according-"ly filled up the blanks with that sum and Texira's name, and "delivered the bond to him. On *non est factum* pleaded, Lord "Mansfield held it a good deed. The same point came before "the Supreme Court of Pennsylvania, in Sigfreid v. Levan, "6 Serg. and Rawle, 308. The plea was *non est factum*; "and on objection to the deed, it was admitted in evidence, "and finally a verdict was given for the plaintiff. Although "the question was not directly decided, as it arises on the ad-"missibility of the evidence, yet it may be collected from the "case, that the opinion of the court was in conformity to the "case of Texira vs. Evans. Judge Duncan enters into an "elaborate review of the authorities, although Texira vs. "Evans, seems to have escaped his attention. In delivering "the opinion he says: 'I would consider him (that is, Peter

" Levan, who filled up the bond,) as the agent of the defend-
" ants, at least. I would so leave it to the jury; and if he is
" so considered, then he delivered the bond to the plaintiff,
" having authority so to do, and it would be their deed." The
" obligors wrote their names, and affixed their seals to a piece
" of paper, and agreed that Judge Drennan should fill up the
" bond, which was accordingly done. It is part of the case,
" that the instructions were faithfully fulfilled, nor is there
" any pretence that after the bond was completed, any alter-
" ation was made in it. It is an ungracious defence on the
" part of the defendants, who do not allege any mistake of
" the instructions, or any fraud, but seek to take advantage of
" a technical principle to defeat a just debt. To hold that this
" comes within the principle, 'That where a deed has been
" acknowledged before a magistrate appointed by law to take
" and certify the acknowledgment, in order that the deed
" may be recorded, the parties have no right to make the
" most trifling alteration,' is a misapplication of the princi-
" ple. Judge Drennan stands in the situation not only of a
" magistrate but an agent. The deed was complete only when
" filled up according to his instructions. The delivery and
" acknowledgment take effect from that time, and it is not
" pretended that any alteration was made after the comple-
" tion of the deed. This is nothing more than the applica-
" tion to a sealed instrument, of a practice which has been
" repeatedly recognized in relation to promissory notes and
" bills of exchange. There is as much danger from the one
" as the other, and in the absence of mistake it is so far from
" being productive, that it is is a prevention of fraud."

In the case of Lockhart vs. Roberts, 3 Bibb(Ky.) 361, it was held that a plea that the " paper (a bond) was blank when signed, and so is not his (the defendant's) deed," is not sufficient; for whether the paper was signed before or after the obligation was written, is immaterial; the obligation takes effect from delivery.

In the case of Anderson vs. Lewis, 1 Freem. Ch., 178, it was decided that a deed takes effect by virtue of its delivery, and that although it may have been in blank when signed, yet if filled up when delivered it would be valid.

It is believed that the principles for which we are contending have been fully recognized and sanctioned by this court. In the case of White vs. Vt. & Mass. R. R. Co., 21 How., 575, above cited, this court broadly and emphatically sanction and affirm the principles of the case of Texira vs. Evans, and overruled some of the later English cases.

It will thus be seen that the principle is well settled upon the highest authority and reason, that a deed made with *ma-*

terial blanks left in it and delivered to a *third party* as agent, with *parol* authority to fill the blanks and make delivery, is, when thus delivered, a good deed. As has already been pointed out, the case is much strengthened when the party entrusted with the filling of such blanks and making delivery of the deed is one of the co-grantors or obligors; and it is further strengthened if, in addition to this, such party is the husband of the other grantor in the deed. Indeed, it might well be contended that, inasmuch as the manual delivery of a deed can necessarily only be made by one of the grantors therein, such delivery when made is really the *direct* act of all the grantors, and should be so construed.

Under this head we may also remark, that it has been uniformly held that although one partner cannot bind his co-partner by deed or writing under seal without *express* authority for that purpose, yet such authority need not be *under seal*; it may be by *parol*, and it may be by *prior* parol authority, or *subsequent* parol ratification.

Story's Partnership, sec. 122, and notes and authorities cited.

Skinner vs. Dayton, 19 Johns, 513.

Cady vs. Shepherd, 11 Pick., 400.

It will thus be seen that the doctrine of the sufficiency of parol authority to execute deeds, is carried much farther in the case of partners in business than in that of ordinary agents. But it is difficult to see what principles of reason or equity, or public policy can be invoked, or what arguments can be adduced in support of this established doctrine in the case of partnerships, that will not apply with even greater force and reason to the case of husband and wife.

Again:—The appellees have themselves put the declarations of Mrs. Foster herself in evidence to show that her husband was authorized by her to fill in the name of the mortgagee and a debt of a "few hundred" or "several hundred" dollars in this mortgage, and to deliver the same thus filled. Certainly, then, the filling in of a larger sum by the husband than he was authorized or expected by his wife to fill in, could not invalidate the mortgage, or in any way prejudice the mortgagee, who knew nothing of this private limitation on the husband's apparent authority. (Who in point of fact did not know that any blanks had been filled in the mortgage at all.)

The husband was clearly acting within the general and apparent scope of his authority, as evidenced by the *indicia* of authority with which he had been furnished and entrusted by the wife herself. No principle of agency is better settled than that the principal is bound under such circumstances by

the acts of his agent. Third parties are not expected to know and cannot know what private communications may pass between the principal and his agent, nor what private limitations the principal may have imposed upon the authority of his agent. It is always sufficient to bind the principal as to third parties, if the agent is acting within the apparent general scope of his authority. Any other or different rule would speedily put an end to all transactions with agents.

By her own showing, then, Mrs. Foster is bound by this mortgage. Indeed, Mrs. Foster's long silence and acquiescence, after the delivery and public record of this mortgage, ought to be held of themselves as a complete and conclusive ratification thereof on her part, even on the assumption that it was originally executed without due authority from her.

Under this head, therefore, we respectfully insist—

1ts. That the blanks in this mortgage having been filled by one of the grantors before it was delivered to the grantee or party entitled under it, *there was no alteration of Mrs. Foster's deed.*

2d. That the delivery of the instrument by Mrs. Foster to her husband, as shown by the evidence, was authority to him to fill the blanks and complete the execution.

3d. That by and upon, and only by and upon the delivery of the mortgage in a complete condition to the appellant, did either the signing, sealing, or *acknowledgment* thereof take effect and become operative, or the instrument become a *deed.*

4th. That by her subsequent silence and acquiescence, Mrs. Foster ratified the mortgage.

5th. It was claimed by the opposite counsel on the hearing in the court below that inasmuch as by the statute of Minnesota the due acknowledgment of her deed of conveyance by a married woman was essential to its validity, Mrs. Foster must have *re acknowledged* this mortgage *after* the blanks were filled to have rendered it her deed. This position, on the assumption of the correctness of this construction of the statute, would be well taken if the case at bar were one where the blanks in the instrument had been filled *after* its delivery to the grantee,—that is, after its execution; for in such case, inasmuch as the acknowledgment by Mrs. Foster would be essential to the execution of the deed, so in like manner her *re-acknowledgment* thereof would be essential to its *re execution.* But in the case at bar there was no re execution of the deed, and no occasion for such re execution. The blanks were filled *before* delivery to the grantee, and even before the instrument left the hands of the grantors, and consequently

before execution. Hence the principle contended for has no application to the case at bar.

Assuming the due acknowledgment of a deed of conveyance of real estate by a married woman to be essential to its validity under the statutes of Minnesota, such acknowledgment thereby becomes one of the necessary acts in the process of its execution,—an essential part of the execution, like the the signing and sealing thereof; and hence, like such signing and sealing, such acknowledgment only becomes *effectual* upon and by the delivery of the deed.

As in the case of a *feme sole*, or other ordinary grantor, the signing and sealing of the deed take effect when the instrument is delivered; so in the case of a married woman, the signing, sealing and *acknowledgment* required on her part for the execution of her deed, take effect upon the delivery thereof. Hence, where alterations are made in the deed of a married woman *before* its delivery, a re acknowledgment on her part is no more requisite to give her deed validity than a re signing and re-sealing. If the alterations are made *after* delivery, then not only must she re sign and re-seal the instrument, or, what is the same thing, readopt her former signature and seal, as any grantor must do in like case, but she must also re-acknowledge the instrument to render it *effectual* as her deed. Why? Because in her case the acknowledgment is an essential part of the execution of the deed. An ordinary grantor signs and seals his deed, and then delivers it and it becomes effectual. A married woman signs, seals and *acknowledges* her deed, and then delivers it and it becomes effectual.

In either case, alterations made *after* execution, that is, after delivery to the grantee or party entitled under the instrument, avoid the deed unless such alterations are made with the consent of the grantors. Such consent is held to be tantamount to a re execution of the instrument. That is, in the case of ordinary grantors the consent of such grantors to the alterations is held to be equivalent to a re-signing, re-sealing and re-delivering of the deed. They re adopt their former signatures and seals and re deliver the instrument, and it becomes their new deed.

So, in like manner, in case of alterations made in the deed of a married woman *after* its execution, she must not only readopt her former signature and seal, but must also re-acknowledge, as well as re deliver the instrument, to render it valid; for, in her case, as her acknowledgment was essential to the original execution of the deed, so her re-acknowledgment is essential to its re-execution.

In all cases alterations made in a deed *after* its execution, avoid it, unless it be re-executed as altered.

In the case at bar, however, no alterations in the mortgage were made *after* its delivery. The blanks were filled before it passed out of the hands of the grantors, that is before it became a deed, and the mortgage was in all respects perfect when delivered by one of the grantors to the grantee. No alterations of the deed, therefore, were ever made. When the blanks were filled the instrument had not yet become a deed. There was never, then, any necessity or occasion for its re-execution; never any necessity or occasion for Thos. Foster to re-sign, re-seal and re deliver the mortgage on his part, nor for Mrs. Foster to re-sign, re-seal, *re-acknowledge*, and re-deliver it on her part.

Now it is precisely here that the untenableness and inconsistency of the position of the opposite counsel on this point in the case at bar, as well as the error of the court below become patent.

The evidence shows that the mortgage was signed, sealed and acknowledged by *both* grantors *before* the blanks in it were filled, but was not delivered until *after* the blanks were filled. Now the opposite counsel maintain, and the court below decided, that this mortgage was *valid* as to Thos. Foster, one of the grantors, and *void* as to Mrs. Foster, the other grantor; that is, that it was the *deed* of Thos. Foster, but *not* the deed of Mrs. Foster.

Now it is obvious that if re-execution was necessary to the validity of the deed on the part of one of the grantors, it was equally necessary on the part of the other; that if it was essential that Mrs. Foster should re execute the deed *after* the blanks were filled, it was equally essential that Thos. Foster should also re-execute it. It is evident that the mortgage must stand, or fall as to both grantors alike; that it was either the deed of *both* the grantors, or that it was the deed of neither.

But the blanks were filled *before* the delivery of the mortgage, and therefore *before* its execution; hence no re-execution of the instrument was required on the part of either grantor, and consequently no re-acknowledgment was necessary on the part of Mrs. Foster.

The principle and authorities therefore sought to be applied in the premises are without application.

As has already been shown, the execution of a deed and all the acts which go to make up its execution, are in *fieri* till *delivery*. When delivery takes place, and only then, each of these acts,—the *acknowledgment* as well as the signing and sealing,—takes effect, and the deed becomes operative.

From its delivery, and only from its delivery, the deed *speaks*. Until then, the filling of blanks, the signing, the sealing and the acknowledgment where the acknowledgment is necessary—are only so many acts in the *process* of the execution. The *delivery* necessarily is the last and *consummating* act.

But we do not admit that under the statute of Minnesota the acknowledgment is a part of the execution of a deed by a married woman.

See Comp. Stat. of Minn., p. 397, *et seq.*

6. Finally: The equities of this case are altogether with the appellant. He advanced a large sum of money to the appellee, Thomas Foster, solely upon the faith of the validity of this mortgage, and in the entire belief that the appellees were acting in perfect good faith and without the presence of a single circumstance to excite his suspicion or put him upon enquiry. It is probable that Mrs. Foster has participated in the benefit of this loan—she has furnished no evidence to the contrary. At all events she deliberately and understandingly put it into the power of her husband to obtain the loan. Will she now be permitted, especially at this late day, in conjunction with her husband, to repudiate her acts, and thus, in effect, defraud an innocent third party whom she has been chiefly instrumental in bringing into his present position? Certainly a court of equity will not aid directly or indirectly in the consummation of such a wrong, but will rather interpose its arm to avert it. Even if Mrs. Foster were entirely innocent in the premises, and was the victim of the fraud of her husband, yet either she or the plaintiff must suffer loss in the present case, and no principle is better settled than that where loss must fall upon one of two innocent parties, it must be borne by him who is most in fault. There is no reason for exempting the wife from the operation of this familiar and salutary rule. On the contrary, in transactions between the husband and wife and third parties, there is the strongest reason for the most stringent application of this principle.

It would oviously be against public policy, and constantly expose all transactions relative to real estate to the greatest hazard, to allow a married woman to screen herself from the consequences of her own acts under the circumstances of the present case.

Who in such case would be safe in receiving a conveyance to which a married woman was a necessary party? If, when one receives such a deed at the hands of the husband, it is in all respects perfect and unattended with marks of suspicion, shall he, nevertheless, be liable to be subsequently told that when the wife signed, sealed and acknowledged it, and deliv-

ered it to her husband, it was not thus perfect, and, that, therefore, it is no deed as to her?

And this, too, in the absence of fraud, and as an ordinary rule of human conduct? Such a doctrine subordinates all other interests to those of married women. Doubtless it has been the wise and liberal policy of modern legislation to guard with solicitude the rights of married women, but it could not be the intention of the lawmaker that his benevolent provisions in the premises should be so construed and applied as to furnish an efficient means of entrapping the unwary and victimizing the innocent.

For the foregoing reasons, the counsel for the appellant respectfully submit that the court below erred in its decrees; and that the appellant is entitled to the relief prayed in his bill, and that the appellees' cross bill should be dismissed.

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